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No.

2359

IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

ROBERT M. BETTS, Receiver of the Cornucopia Mines  
Company of Oregon,

Plaintiff in Error,

vs.

JOHN L. BISHER, Jr., by JOHN L. BISHER, his  
Guardian,

Defendant in Error.

Writ of Error to the District Court of the United  
States for the District of Oregon.

TRANSCRIPT OF RECORD.

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Defendant in Error.

---

**Names and Addresses of Attorneys  
upon this Writ:**

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**For Plaintiff in Error:**

Emmett Callahan,	Spalding Bldg., Portland, Oregon
Smith & Littlefield,	Corbett Bldg., Portland, Oregon

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**For Defendant in Error:**

Boothe & Richardson,	Portland, Oregon
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*In the District Court of the United States for the  
District of Oregon.*

Be it Remembered, that on the 12 day of October, 1912, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit:

**[Complaint.]**

*In the District Court of the United States for the  
District of Oregon.*

JOHN L. BISHOP, Jr., by John L. Bishop, his guardian ad litem,

Plaintiff,

vs.

THE CORNUCOPIA MINES COMPANY OF OREGON, a corporation, and ROBERT M. BETTS, Receiver of said Cornucopia Mines Company of Oregon,

Defendants.

The plaintiff, for cause of action against the defendants, alleges:

I.

That during all the times herein mentioned, the above named defendant, the Cornucopia Mines Company of Oregon, has been and now is a corporation organized under and by virtue of the laws of the State of Maine, and has duly qualified to transact business in the State of Oregon, and is now qualified to transact business within the State of Oregon.

## II.

That on or about the 21st day of December, 1911, under and by virtue of a petition of the Hamilton Trust Company, plaintiff, vs. Cornucopia Mines Company of Oregon and Valentine Laubenheimer and S. W. Holmes, defendants, in this Court, then the Circuit Court of the United States, for the District of Oregon, the above named Robert M. Betts was appointed Receiver of the said Cornucopia Mines Company of Oregon, with the usual powers of receivers, and thereupon said Robert M. Betts thereafter and on the 2nd day of January, 1912, filed his bond as such receiver, which bond was approved by the Court, whereupon said receiver became in the possession and management of all the property of said corporation, and he has ever since been and now is the duly appointed, qualified and acting receiver of the said Cornucopia Mines Company of Oregon, and is in possession of all the properties of said corporation of whatsoever kind and nature. That said receiver upon his appointment was duly authorized to carry on the mining business of said Cornucopia Mines Company of Oregon in improving and developing its properties in Baker County, Oregon, and was from and after his appointment in actual possession of all the property of said corporation, and in the actual management and conduct of its said business, and said receiver has not been discharged by any order of the Court and is still the duly appointed, qualified and acting receiver of said corporation.

## III.

The plaintiff further alleges that on or about the 28th day of July, 1912, he was in the employ of the defendants as a common laborer and was under the control of a foreman of the defendants, whose duty it was to direct the plaintiff in and about his employment. That at the same time the defendants were maintaining three heavy copper wires for the transmission and use of electricity of a dangerous voltage strung upon arms or supports fastened upon poles about twenty-five feet above the ground, leading from the power house to the defendants' stamp mill.

## IV.

That the defendants unlawfully and negligently constructed and maintained the aforesaid transmission wires of dangerous voltage by failing to insulate the same at the poles and arms upon which they rested, and where the employees of the defendants were liable to come in contact therewith, and unlawfully and negligently strung said dangerous voltage wires at an insufficient distance from the poles and supports to permit repairers to freely engage in the work of repairs without danger of injury therefrom, and unlawfully and negligently constructed, maintained and mingled dead wires strung upon the same support with said live wires, and unlawfully and negligently failed to designate the arms or supports bearing said live wires by a corol or other designation, and unlawfully and negligently failed to use any device, care or precaution to protect the safety of life and limb of the

employees of the defendants in the use of repair of said dangerous voltage wires.

V.

That the defendants knew or should have known by the exercise of ordinary care that said wires were so unlawfully and defectively constructed.

VI.

That on or about said 28th day of July, 1912, the defendants were engaged in working and developing the mining properties of said Cornucopia Mines Company of Oregon in Baker County, Oregon, and were using the transmission line above mentioned, and defectively constructed, as aforesaid, to propel the machinery of their stamp mill.

VII.

That while the plaintiff was working for the defendants as a common laborer, as aforesaid, he was ignorant of the use of electricity and inexperienced in the art or construction of electric wires or electric currents and in handling wires charged with electricity, and on said date the defendants, knowing that the plaintiff was ignorant of the use of electricity and inexperienced in the art or construction of electric wires or electric currents and in the handling of wires charged with electricity, negligently and carelessly directed the plaintiff to assist a foreman of the defendants in placing insulators on said alternating current of live wires at a place where they were defectively constructed and maintained, as aforesaid.

VIII.

That in order to perform said work, the defendants

negligently and carelessly required the plaintiff, under the direction of their foreman, to climb the poles sustaining said live wires using climbers and without any ladder or other apparatus to sustain his weight, and at the same time assist his foreman in lifting with his hand one of said live wires while the foreman placed the insulator on the arm carrying the same, and negligently and carelessly failed to turn off the electric current from said live wires while the plaintiff was so assisting the foreman, and negligently and carelessly failed to provide any means to protect the plaintiff from being injured by said live wires while performing his said work.

### IX.

That while the plaintiff was thus assisting the foreman of the defendants, and while sustaining his own weight underneath said line of live wires by the use of climbers, and under the direction of the foreman of the defendants assisted the said foreman in lifting one of said live wires and held the same in his hand while the foreman was endeavoring to place an insulator on the arm carrying the same, and while so holding said live wire, without any negligence on his part and without knowing that it was dangerous so to do, the plaintiff received an electric shock, whereby an electric current from said live and deadly wire passed through his body with such force and violence that he was so charged with electricity that he became paralyzed and helpless and unable to free himself from said wire, and said electric current continued

to pass through his body and to burn his arms and hands until he was released by his foreman, and on account of such electric shock and the burning of his hands and body, the plaintiff became sick and sore so that he was confined in a hospital for many weeks where he was required to receive medical and surgical treatment, and on account of said electric shock it became necessary to amputate the plaintiff's right arm near the elbow and a portion of his left forearm is torn away to such an extent that the flesh, sinew and bones of his left arm are so badly crippled, burned and torn away that his left arm is now almost totally destroyed, and the plaintiff has lost his right arm thereby and the entire use of his left arm and hand, and he has become permanently injured and crippled for life and unable to perform any sort of manual labor, and has during all of said time suffered great physical pain and mental agony and will suffer physical pain and mental agony for the remainder of his life.

### X.

That at the time the plaintiff was injured, as afore said, he was eighteen years of age and was a strong and healthy young man, capable of earning not less than \$3.00 per day, and on account of the negligence and carelessness of the defendants and the injuries so received, the plaintiff has been damaged in the sum of Fifty Thousand Dollars.

WHEREFORE, the plaintiff prays for judgment against the defendants for the sum of Fifty Thousand

Dollars, and for his costs and disbursements herein.

(S) BOOTHE & RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Complaint. Filed Oct. 12, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of January, 1913, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

**[Answer.]**

(Title.)

Comes now the defendant Robert M. Betts, Receiver of said Cornucopia Mines Company of Oregon, and for his answer to the Complaint filed herein admits, denies and alleges as follows:

I.

This defendant admits that during all the times mentioned in the complaint it was and now is a corporation organized under the laws of the State of Maine, and has complied with the laws of the States of Maine and Oregon so as to entitle it to do business in said States.

II.

This defendant admits that during all the times and dates mentioned in the complaint herein he was the duly appointed, qualified and acting Receiver of "Cornucopia Mines Company of Oregon", as alleged by plaintiff in the second count of his complaint; except as herein and hereafter in this answer denied and alleged to the contrary.

## III.

This defendant denies that on or about the 28th day of July, 1912, that the plaintiff was in the employ of the defendant as a common laborer and under the control of a foreman of the defendant as such receiver of the Cornucopia Mines Company of Oregon; denies that on or about the 28th day of July, 1912, the defendant as such receiver of Cornucopia Mines Company of Oregon, maintained three heavy copper wires for the purpose of transmitting electricity of a high and dangerous voltage upon supports and arms attached and fastened to poles about twenty-five feet above the surface of the ground along a line leading from an electric power plant to the stamp mill at defendant's mines.

## IV.

This defendant denies that as said receiver he maintained, kept or constructed electric wires strung upon poles of a high and dangerous voltage uninsulated whereby persons in the employ of defendant were liable to come in contact with the same, and be maimed or injured thereby; defendant further denies that he as such receiver of Cornucopia Mines Company of Oregon, did negligently and unlawfully string dangerous wires of high and dangerous voltage upon poles without proper supports, and at insufficient distances from each other that would not freely permit any person employed or engaged in repairing such electric wires freely and without danger of injury therefrom; denies further that he as said receiver did

maintain and mingle dead wires strung upon supports with live wires charged with electric current, or that he negligently and unlawfully failed to designate the poles, arms, or supports bearing live electric wires by a color or warning designation; denies further that he as said receiver did unlawfully and negligently fail and refuse to employ any device, care and precaution to safeguard and protect the life and limbs of employees engaged in mending or repairing said alleged dangerous high voltage electric wires as described and alleged in the IV count of plaintiff's complaint.

V.

This defendant denies that it was charged with knowledge or that he should have known as such receiver of Cornucopia Mines Company of Oregon, or that by ordinary care that live electric wires were unlawfully, wrongfully and defectively constructed and used in operating and developing said Cornucopia Mines of Oregon, in transmitting electric power over a transmission line from the electric power plant of said Company to its mines and stamp mill; therefore defendant denies that he had such knowledge by the exercise of ordinary care or otherwise that said electric wire were in anywise defectively constructed.

VI.

Defendant denies that on or about the 28th day of July, 1912, that the Cornucopia Mines Company of Oregon, or that he as Receiver of Cornucopia Mines Company of Oregon, was engaged in working, developing, or operating the Cornucopia Mines Com-

pany of Oregon, in Baker County, Oregon; or that said Company or its said receiver was using a transmission electric line of a defective character or otherwise in operating or running the Stamp Mill of said Company.

## VII.

This defendant denies that the plaintiff was employed as a common laborer by him as Receiver of Cornucopia Mines Company of Oregon, or by a foreman of the defendant as a common laborer or in any capacity whatsoever in or about the construction of or the placing of insulators on alternating current of live electric wires which were maintained and defectively constructed.

## VIII.

Defendant denies that he employed, ordered or directed the plaintiff by or through a foreman of defendant to work about or upon any poles, electric wires charged with live current of electricity, or to carry or place upon an arm any material, insulator, or electric device or part upon any electric works or electric construction being made or operated by defendant, by defendant's order, or by or through a foreman of defendant.

## IX.

The defendant for answer to the IX paragraph or count of plaintiff's complaint denies that the plaintiff was engaged or employed by the defendant or under the control or guidance of defendant foreman in or about any construction work upon an electric trans-

mission line in repairing or placing insulators upon arms used for carrying electric wires; denies that plaintiff was maimed, injured, or suffered any bodily harm or injury from live electric wires charged with electric current by coming in contact with same while in the employment of defendant, or under the control or guidance of defendant's foreman; defendant denies that plaintiff as an employee of defendant was injured, maimed or crippled for life while in the employment of defendant as a common laborer; denies that defendant has suffered great physical pain and agony from any injury received by any act, deed, commission or omission caused to plaintiff by the defendant.

#### X.

Defendant denies that the plaintiff suffered damages in the sum of \$50,000.00, or been damaged in the sum of \$50,000.00 or any other sum by, through or on account of the negligence and carelessness of defendant toward plaintiff in any manner whatsoever.

#### XI.

The defendant alleges that he has no knowledge or information sufficient to form a belief whether or not the plaintiff as alleged in the complaint is the guardian ad litem; therefore defendant denies that John L. Bisher is the Guardian ad litem of the plaintiff.

#### XII.

And the defendant denies each and all of the other averments contained in said complaint not herein either specifically admitted or denied.

## XIII.

Defendant denies that Cornucopia Mines Company of Oregon, one of the defendants named in the complaint, was at the times and dates set forth in the complaint, and at the times and dates of the alleged injury and grievances described in the complaint the owner, or in the possession of the Cornucopia Mines, Stamp Mill, Electric Power plant or Poles carrying the transmission wires and electric power from the power house to the said Stamp Mill, or in control, possession, or owner of said described electric power plant which plaintiff alleges caused the injury complained of in the third paragraph of the complaint;

2. Defendant Robert M. Betts, Receiver of said Cornucopia Mines Company, of Oregon, denies that he was in possession, or operating, or developing the said Cornucopia Mines, Power plant, Electric transmission line from said power plant to said Stamp Mill at the time and date of the alleged injury to plaintiff, as set forth and alleged by plaintiff in the complaint.

3. Defendant denies that Cornucopia Mines Company of Oregon, or that he as Receiver of said Cornucopia Mines Company, was the owner or in possession of, or operating and developing said mines and running or using the electric power plant either in whole or in part upon or about the date and time when plaintiff alleges in his complaint he was injured and maimed by an electric current; denies that said Cornucopia Mines Company of Oregon, or Robert M. Betts, as said receiver was operating said electric power

plant and transmission line upon which plaintiff alleges in his complaint he was injured and maimed on or about the 28th day of July, 1912.

Defendant denies that the plaintiff was in the employment of the defendant as a common laborer or in any other capacity on or about the 28th day of July, 1912, the date upon which he alleges he was maimed and injured in the manner described in the complaint.

For further and separate defenses, defendant alleges, and says:

That the Cornucopia Mines, stamp mill, electric power generating plant and all other property described in plaintiff's complaint, and the particular poles, the three heavy copper wires used for transmitting electric power from said power plant to the stamp mill of Cornucopia Mines Company's mines at or near the town of Cornucopia, Baker County, Oregon, were in the possession and control of Robert M. Betts, as a lessee thereof under a written and duly executed lease from Cornucopia Mines Company of Oregon a corporation as lessor to Robert M. Betts, lessee, said lease being dated and executed by and between said lessor and lessee, on the 9th day of November, 1911; to run for the period of one year from the first day of November, 1911, to noon of the 1st day of November, 1912, when it expired by its terms and limitation; that said lease as aforesaid was duly recorded in the office of the Clerk and Recorder of Baker County, Oregon, on the 28th day of November, 1911, in Book

of "L. & A." Vol. G, page 270, at 10:30 o'clock A. M. on said day;

2. That on or about the 28th day of July, 1912, and for some time previous thereto the plaintiff was an employee of Robert M. Betts, lessee of Cornucopia Mines Company of Oregon, his duties and labor consisted in carrying insulators and pins and certain paraphernalia used in repairing electric appliances and copper wires used in transmitting electric current; plaintiff's sole duty was to go from pole to pole as the work progressed and hand such insulators and tools to the lineman engaged in repairing said transmission line;

3. That when said plaintiff was injured as alleged in the complaint on the 28th day of July, 1912, as an employee of Robert M. Betts, lessee of Cornucopia Mines Company of Oregon, his duties did not require that he climb poles or go to any place or to come into contact with live or dead electric wires, and therefore the injury alleged to have been suffered by plaintiff in his complaint herein was consequent upon, and due to plaintiff's own voluntary carelessness and negligence, and not to that of the defendant Robert M. Betts, Receiver of said Cornucopia Mines Company of Oregon, or to Robert M. Betts, lessee of Cornucopia Mines Company of Oregon.

Defendant's further defense:

Defendant alleges and says, that the copper transmission wires complained of in the complaint herein, were strung and placed at a sufficient distance from

each other so as to permit repairs thereon to be made freely and safely by the lineman or repair man while so engaged in repairing said transmission wires; that defendant employed and provided every necessary device and precaution to protect its employees, and the plaintiff while engaged in or about the said transmission wires in repairing same; that said transmission wires as described in the complaint filed herein were in plain view of the plaintiff when he entered into the services of Robert M. Betts, lessee of Cornucopia Mines Company of Oregon, and so remained during all the time of his employment, and, with full notice and knowledge of the construction of said transmission wires and electric power plant; that plaintiff had full personal knowledge of the condition, and operation of said electric power plant and said transmission line, that plaintiff voluntarily entered upon the work which he was employed to do, and continued therein until the time of his accident without objection or complaint.

Further answering defendant says and alleges:—

4. That as a matter of fact and truth, that while said plaintiff was in the service of Robert M. Betts, lessee of Cornucopia Mines Company of Oregon, mines and machinery, on the 28th day of July, 1912, and for some time previous thereto, and at the time mentioned in the complaint he was an experienced electrician who had full knowledge of the work in which he was engaged and employed and of the means, instruments, tools, materials, plans and methods employed in the

performance of such work mentioned in the complaint and of the character of his said employment and he voluntarily assumed the risks and danger of accident incident to that employment;

That the accident described in the complaint resulting in plaintiff's injury arose from and was caused by the voluntary act of the plaintiff on his own motion in climbing the pole upon which the electric wires mentioned in the complaint were fastened and strung, plaintiff having full knowledge and notice that it was no part of his employment to climb said pole or poles, and that said plaintiff in his said employment knew that it was no part of his duty and employment to climb said pole as mentioned in the complaint, and that in so doing he voluntarily assumed such risk and hazard outside of his regular employment.

Defendant further answering the complaint, says and alleges:

That the Statute, Chapter 3, on page 16 of the General Laws of the State of Oregon, 1911, from Sections 1 to 7 inclusive known as the Employers' liability initiative law, upon which plaintiff founds and predicates his right of action in his complaint herein, is unconstitutional and void; in that it deprives the defendant of its constitutional right to set up its defense of contributory negligence against plaintiff herein under the laws and constitution of the United States of America.

Wherefore, having fully answered the complaint, defendant prays that plaintiff take nothing by this

action and that defendant have judgment against plaintiff for its costs and disbursements.

EMMETT CALLAHAN.

[Endorsed]: Answer. Filed Jan. 29, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 5 day of February, 1913, there was duly filed in said Court, a Reply, in words and figures as follows, to wit:

**[Reply.]**

(Title.)

Now comes the plaintiff in the above entitled action and replies to the answer of the defendant, Robert M. Betts, Receiver of said Cornucopia Mines Company of Oregon, as follows:

I.

He denies that the Cornucopia Mines stamp mill, electric power and generating plant, or all other, or any property described in the plaintiff's complaint, or the particular poles, or any poles, or the three heavy copper wires used for transmitting electric power from said plant to the stamp mill of the Cornucopia Mines, or any other copper wires so used at or near the town of Cornucopia, Baker County, Oregon, or elsewhere, or that any other properties of said Cornucopia Mines Company of Oregon, were in the possession or control of Robert M. Betts, as lessee thereof under a written lease, or any other lease, executed from the Cornucopia Mines Company of Oregon, a

corporation, or otherwise, to Robert M. Betts.

## II.

He denies any knowledge or information sufficient to form a belief as to whether or not said lease was dated the 9th day of November, 1911, or any other date, and denies any knowledge or information sufficient to form a belief as to whether or not such lease was to run for a period of one year from the 1st day of November, 1911, to the 1st day of November, 1912, or for any other period of time; and denies any knowledge or information sufficient to form a belief as to whether or not said lease was recorded in the office of the Clerk or Recorder of Baker County, Oregon, or elsewhere, on the 28th day of November, 1911, or at any other time in Book "L. & A.", Vol. "G", page 270, or elsewhere.

## III.

Denies that on or about the 28th day of July, 1912, or at any other time, or any time previous thereto, the plaintiff was in the employ of one Robert M. Betts, lessee of Cornucopia Mines Company of Oregon, and denies that he was in the employ of the said Robert M. Betts, in any other manner than that of Robert M. Betts, Receiver, as in the complaint herein set forth.

He denies that his duties and labor consisted in carrying insulators and pins and certain paraphernalia in repairing electric appliances and copper wires used in transmitting electric current, or that his duties consisted in carrying any other pins or paraphernalia

used in repairing electric appliances or copper wires, or for any other purposes, and denies that he was employed in any other manner than that set forth in his complaint herein. He denies that his sole duty was to go from pole to pole, as the work progressed, or otherwise, or hand such insulators or tools or other articles to the lineman or other persons engaged in repairing said transmission line, and denies that the duty of the plaintiff was other than that set forth in his complaint filed herein.

#### IV.

He denies that when the plaintiff was injured, as alleged in the complaint, he was an employee of Robert M. Betts, lessee of Cornucopia Mines Company of Oregon, but avers, as heretofore stated and in said complaint alleged, that the plaintiff was in the employ of Robert M. Betts as Receiver of the Cornucopia Mines Company of Oregon, and not otherwise. He denies that his duties did not require him to climb poles or to go to any place, or to come into contact with live or dead electric wires, and denies that the injuries received by him, as set forth in the complaint, were due to his own voluntary or other carelessness or negligence, and denies that his injuries so received occurred in any other manner than that set forth in the complaint herein.

#### V.

He denies that the copper transmission wires complained of in the complaint, were strung or placed at a safe distance from each other so as to permit re-

pairs thereon to be made freely or safely by the line-man or repairman so engaged in repairing said transmission wires. He denies that the defendant employed or provided every necessary device or precaution to protect its employees or the plaintiff while engaged in or about said transmission wires, or any of them, in repairing the same; he denies that he had full notice or knowledge, or any notice or knowledge, of the construction of said transmission wires or electric power plant, or any part thereof.

He denies that he had full personal knowledge, or any knowledge whatever of the condition of operating said electric power plant or said transmission line, and denies that the plaintiff voluntarily entered upon the work which he was employed to do, or that he entered upon said work in any other manner except as an inexperienced laborer to perform such duties as should be required of him by the defendant, and denies that he continued said employment without objection or complaint.

## VI.

The defendant denies that he was in the service of Robert M. Betts, lessee of the Cornucopia Mines Company of Oregon, or otherwise than as hereinbefore stated and in the complaint alleged, to wit: That he was in the employ of Robert M. Betts as Receiver of the Cornucopia Mines Company of Oregon, and not otherwise, and denies that on the 28th day of July, 1912, or at any other time, he was an experienced electrician, or had full or any knowledge of the work

in which he was employed, or of the means, instruments, tools, materials, plans or methods employed in the performance of the work mentioned in the complaint, or the character of his said employment, and avers that he performed such services as he was directed to perform by the foreman of the defendant and not otherwise, and denies that he voluntarily or at all assumed the risk or danger of accident incident to that employment.

## VII.

He denies that the injury resulting to the plaintiff, as described in the complaint, arose from or was caused by the voluntary act of the plaintiff, or on his own motion in climbing the pole upon which the electric wires mentioned in the complaint were fastened or strung, and denies that said injury arose from any other manner than that of the negligence of the defendant, as set forth in the complaint; and denies that the plaintiff had knowledge or notice that it was no part of his employment to climb said pole or poles, but avers that he was directed to climb said poles by the foreman of the defendant in his said employment.

The plaintiff denies that he knew that it was no part of his duty or employment to climb said pole, as mentioned in the complaint, but avers that it was his duty to climb the same, and that he did so climb same under the direction of the defendant, as set forth in the complaint, and not otherwise, and denies that in so doing, or otherwise, he voluntarily assumed such risk or hazard outside of his regular employ-

ment, and denies that he voluntarily assumed any risk or hazard, either inside or outside of his employment, and avers that he was inexperienced in said business and performed such work under the direction of the foreman of the defendant, and not otherwise.

### VIII.

He denies any knowledge or information sufficient to form a belief as to whether or not the Statute, Chapter 3, page 16 of the General Laws of the State of Oregon, 1911, from Section I to VII inclusive, known as the "Employers Liability Initiative Law", or any part of said law, or any other law upon which the plaintiff founds or predicates his right of action, is unconstitutional or void, and denies any knowledge or information sufficient to form a belief as to whether or not said law, or any other law, deprives the defendant of its constitutional or other right to set up its defenses of contributory negligence or any other defense under the laws of the Constitution of the United States of America, or under any other laws.

Further replying to that portion of defendant's answer wherein the said Robert M. Betts pretends to have been conducting the business of the Cornucopia Mines Company of Oregon as lessee of said properties, the plaintiff alleges that on the 21st day of December, 1911, the said Robert M. Betts was appointed Receiver of all the properties of the Cornucopia Mines Company of Oregon in a cause in this court entitled "Hamilton Trust Company, plaintiff, vs. The Cornu-

copia Mines Company, of Oregon, a corporation, and Valentine Laubenheimer, and S. W. Holmes, respondents", and he was by said order authorized and directed to take immediate possession of all and singular the real and personal property of said Cornucopia Mines Company of Oregon, wherever situated or found, and to continue the operation of said mining and other property, and every part and portion thereof as heretofore operated, and to preserve the said property in proper condition and keep same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so.

That the said Robert M. Betts duly qualified to act as Receiver of the property of the Cornucopia Mines Company of Oregon, and to operate the same, and to employ men in the operation of said mining company's property, and that thereafter the plaintiff was employed by the said Robert M. Betts as Receiver of said corporation, and it was while the said Robert M. Betts was so conducting said business as receiver that plaintiff was injured as set forth in the complaint.

WHEREFORE, the plaintiff asks for judgment as prayed for in the complaint.

BOOTHE & RICHARDSON,  
Attorney for Plaintiff.

[Endorsed]: Reply. Filed Feb. 5, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on Friday, the 11 day of April, 1913, the same being the 35 Judicial day of the Regular March, 1913, Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Judgment Entry.]**

*In the District Court of the United States for the  
District of Oregon.*

No. 5784

JOHN BISHER, Jr.

vs.

CORNUCOPIA MINES CO.

This cause came on regularly for further trial at this time, pursuant to continuance, jury and attorneys for respective parties present as heretofore; whereupon defendant moves the Court to direct a verdict in favor of the defendant which said motion having been duly argued and submitted, after due consideration, it is Ordered that said motion be and the same hereby is overruled and thereupon after argument of counsel for respective parties and instructions of the court the jury retire to consider of their verdict and thereupon said jury having agreed return into court their verdict as follows "We, the jury, duly sworn and impanelled in the above entitled action do find for the plaintiff, and against Robert M. Betts, the Receiver of the Cornucopia Mines Company of Oregon, the de-

fendant, and assess plaintiff's damages in the sum of Twelve Thousand Five hundred dollars. \$12500.00. E. C. Mears, Foreman," which said verdict is received by the Court and ordered filed and thereupon it is considered, ordered and adjudged that said plaintiff John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, have and recover of and from the defendant, R. M. Betts, the Receiver of the Cornucopia Mines Company of Oregon, the sum of Twelve Thousand five hundred dollars (\$12500.00) together with his costs and disbursements herein taxed at \$282.70.

And afterwards, to wit, on the 9 day of September, 1913, there was duly filed in said Court, a Bill of Exceptions in words and figures as follows, to wit:

**[Bill of Exceptions.]**

(Title.)

Be it Remembered, That at the trial of this cause on the ..... day of April, 1913, Honorable Charles E. Wolverton, presiding, both parties appearing by counsel. A jury was duly impanelled and sworn according to law to try the case and thereupon the plaintiff, to sustain the issues upon his part, offered the testimony of the following witnesses as its evidence in chief and rebuttal:

(Evidence in Chief, pages 40 to 144.—Rebuttal pages 334 to 336 of this Record.)

At the close of the evidence in chief offered by the plaintiff, the counsel for the defendant moved the court for a non-suit in this case, submitting the same

and the reasons therefor in words and figures following:

“The defendant moves for a non suit, upon the ground that the evidence of the plaintiff and his witnesses does not show any negligence of the defendant whatsoever. It shows that the plaintiff does not know how this injury occurred, and the facts of the injury are left to inference.

COURT: I will overrule the motion. You may proceed with your testimony.

Mr. SMITH: We will note an exception, your Honor.”

(Trans. tes. 91)

The defendant, to sustain the issues upon its part, then, through its counsel, offered the testimony of the following witnesses as its evidence in full.

(See pages 144 to 334 of this Record.)

This was all the evidence in the case and at its conclusion, the defendant, Robert M. Betts, receiver, renewed its motion by dictation same to the official stenographer reporting the case, for the court to direct a verdict in its favor, and after the arguments of counsel, both the plaintiff and defendant, to the court upon said motion, the said motion was by the court overruled and which action of the court in overruling the same, the defendant then and there, by permission of the court, excepted; said motion was in words and figures as follows:

“Mr. SMITH: Before proceeding, if your Honor please, to get the record, we desire to interpose a mo-

tion for a directed verdict. The defendant at this time asks the court to instruct the Jury to return a verdict for the defendant upon the following grounds:

First, the evidence shows that both plaintiff and defendant are residents, citizens and inhabitants of the State of Oregon, and this court has no jurisdiction of the case. The bare fact that the defendant is sued as receiver in a court action, does not give this court jurisdiction where the diverse citizenship does not exist.

Second, the evidence conclusively shows that Robert M. Betts, Lessee, was operating this mine, and electrical plant at the time of the injury and not Robert M. Betts as Receiver, and that by reason of the sale of the property, the duties of the receiver had terminated.

Third, That the evidence fails to disclose any proximate cause for the injury other than the negligence of the plaintiff himself. There is no negligence of the master which is shown to have contributed in any way to the injury.

Fourth, the testimony shows that the plaintiff was a volunteer, that the master owed him no duty; that his duties did not require him to be on the pole, or among the wires; that the master did not know that he was among the wires, or on the pole, or was attempting in any way to discharge duties thereon.

Fifth, the evidence shows that the injury was occasioned solely by the negligence of the plaintiff.

COURT: The court will overrule the motion.

Mr. SMITH: We will note an exception on the several grounds separately, if the Court please.

COURT: Very well."

And to which action of the court in overruling, the foregoing motion, the defendant then and there, by permission of the court, excepted.

WHEREUPON, counsel for the plaintiff and the defendant presented their arguments of the case to the jury; Whereupon after said arguments the court charged the jury as follows:

(See pages 338 to 358 of this Record.)

ALBERT SMITH, being on the witness stand, being duly sworn as a witness for plaintiff, was asked the following questions by plaintiff's counsel:

'Q. What is your full name?

A. Albert Smith.

Q. Where do you reside?

A. Halfway.

Q. Halfway, Oregon?

A. Halfway, Oregon.

Q. Where were you residing on or about the 28th of last July?

A. Well, sir, I was working at the Union-Companion mine.

Q. You were working where?

A. At Union-Companion mine.

Q. Union-Companion?

A. Yes, sir. That is the Cornucopia Mining Company.

Q. Whom were you working for on about the

28th of last July?

A. Well, sir, I supposed I was working for Mr. Betts.

Q. You were working for Mr. Betts?

A. Yes, sir.

Q. What kind of work were you doing on or about the 28th day of July, last?

A. Well, I was sifting rock, sifting rock out for the concrete.

Q. Sifting rock?

A. Yes, sir.

Q. Did you know Johnnie Bisher at that time?

A. Yes, sir.

Q. Where was Johnnie Bisher working at the time?

A. He was doing just odd jobs around there, I don't remember just what he was doing at the time.

Q. Did you hear any one give Johnnie Bisher any orders?

A. Yes, sir.

Q. On what day?

A. I heard Mr. Ed Mills tell Johnnie Bisher that What's his Name?

Q. Buxton?

A. Mr. Buxton—to go down, that he wanted him on the line.

Mr. SMITH: How was that, now? State that again.

Q. Just repeat that loud enough so we can hear it.

A. Ed. Mills, Ed. Mills—

Q. Who was Ed. Mills?

A. Well, he was the man that I was working under—the boss.

Q. Working under?

A. Yes, he was the boss. He was the boss at that time, that I was working under.

Q. What did he say?

A. He told Johnnie Bisher that Mr. Buxton wanted him down on the line.

Q. On what line?

A. On the electric line.

Q. Who was Mr. Buxton?

A. Well, he was the man at the powerhouse. I don't know him—don't know the man at all.

Mr. SMITH: We move to strike out the evidence as incompetent, irrelevant and immaterial.

COURT: I will overrule the motion.

To which overruling of said motion defendant excepted, which exception was duly allowed by the court.

L. H. KENNEDY, being on the witness stand, being duly sworn as a witness for plaintiff, was asked by plaintiff's counsel the following questions:

Q. What is the custom of the average employer of requiring linemen to use rubber gloves?

Mr. SMITH: Objected to, as the custom is not pleaded in this case, or relied on. He cannot rely upon the statute and custom at the same time. If he wants to amend his complaint and rely on custom, he can do so.

Mr. RICHARDSON: It is not a question of relying on custom, if they failed to use the safety device, any safety device, for the purpose of protecting their employees.

COURT: I will overrule the objection. You may proceed.

To which overruling of defendant's objection to the foregoing interrogatory, defendant duly excepted and assigns an error in this action.

ROBERT M. BETTS, being on the witness stand, being duly sworn as a witness for defendant, was asked by plaintiff's counsel the following question:

Q. You didn't know that the laws of the State of Oregon required you to have your wires insulated, did you, Mr. Betts?

Mr. SMITH: Objected to as incompetent, irrelevant and immaterial. Ignorance of the law is no excuse for anybody. If it requires it, it does; if it doesn't, it don't. It is for the Court to say. It is immaterial whether he know it or not. Men have been hung when they didn't know what the law was.

COURT: You may answer the question.

To which foregoing question as overruled by the court, defendant duly excepted.

That Mr. Richardson, one of the attorneys for the plaintiff during the course of his argument to the jury argued to said jury and said:—Now, gentlemen, what about Mr. Betts. When we had Mr. Betts, this lessee Betts—lessee Betts on the witness stand, that he likes to be called. That is the title that he wants

to be called. When he was on the witness stand, I asked Mr. Betts, I says, "Mr. Betts, what about those rubber gloves?" First I asked him if he was an electrician. "No." "How came you to suggest to Harry Harbert that you would give him ruber gloves? Did you have any there?" "No." "How came you to suggest it?" "Well, I just naturally thought about it. It just naturally kind of occurred to me that maybe he might want them".

Now, gentlemen, there is a man that is not an electrician, a man that is not versed in the proper devices that an electric lineman needs, by his own admissions, and still he would come in here, and he would have you believe from that witness stand that he was the one that suggested about rubber gloves. Gentlemen, I will tell you, that will not hold water. That does not appeal to a man of real common ordinary intelligence as being something that a man like Betts would think. It looks like it must be a lawsuit, gentlemen, that suggested that, or an injury that suggested that.

It looks like the same thought suggested that to him that suggested that he was all of a sudden, instead of being a receiver of the Cornucopia Mines Company, he was a lessee.

Mr. SMITH: We except to the remarks of counsel, and assign them as error.

Mr. RICHARDSON: Your Honor, I did not make very many interruptions, and I am drawing inferences. The jury knows that I am not stating these as

facts.

COURT: I will overrule the motion. You may save an exception.

To all of the foregoing defendant duly excepted, and assigned as error, which exception was duly allowed by the court.

Whereupon, before the court gave its instructions as to the law of the case to the jury; the defendant requested that the court give the following numbered instructions to the jury as the law of this case: Instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, and 13 respectively; that the court refused and declined to give the foregoing numbered instructions as so requested by the defendant; that upon the refusal of the court to give said instructions as aforesaid, the defendant duly excepted to such refusal to give said instructions as to the law, to each of said instructions defendant saved his exception, which said exceptions were duly allowed by the court.

**[Instructions Requested by the Defendant.]**

**I.**

Gentlemen of the Jury, you are instructed to return a verdict for the defendant.

If the court refuses to give the above instruction the defendant excepts thereto, and without waiving such exception or his rights, requests the following:

**II.**

You are instructed that the evidence in this case does not show the proximate cause of the injury. You

will therefore return a verdict for the defendant.

If the court refuses to give the above instruction, the defendant excepts to such refusal, and without waiving his exception or his rights, requests the following instruction:

### III.

You are instructed that the evidence in this case shows that the plaintiff was injured through his own negligence and not in the discharge of any duty of any kind whatsoever to the defendant. You are therefore instructed to return your verdict for the defendant.

If the court refuses the above instruction, the defendant excepts thereto, and without waiving such exception or his rights, requests the following:

### IV.

You are instructed that the evidence in this case shows that Robert M. Betts, lessee, was operating the mine and power plant at the time of the injury, and as he is not a party to this action your verdict must be for the defendant.

If the court refuses the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following:

### V.

If you believe from the evidence that Johnnie Bischer, at the time he was injured, was on the pole and was not in the discharge of any duty imposed upon him, or if he was on the pole in a furtherance of his own learning or enlightenment, and his duties did

not require him to go up on the pole or among the wires, then he is what is known in law as a volunteer and he cannot recover in this case and your verdict must be for the defendant.

If the court refuses the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following:

VI.

You are instructed that no person can recover damages from another for injuries inflicted by himself.

If, therefore, you believe from the evidence that at the time of the injury Johnnie Bisher received the same through any carelessness of his own, or while doing an act which his duties did not require, or in any other way than through the negligence of his employer, then I instruct you that he cannot recover in this action and your verdict must be for the defendant.

If the court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

VII.

If you believe from the evidence that it was not practicable for the employer to insulate the wires at the place of the happening of the injury, and if you further believe that the weather insulation spoken of was not practicable to use at that place, then I instruct you that the law does not require a vain or useless thing to be done. All statutes must be read

and construed and applied to human affairs by the rule of reason, and the duties which are imposed upon masters by what is known as the Employers' Liability Law of Oregon are such duties and obligations as can be performed reasonably and efficiently, and no obligation is laid upon the master to place upon his business an expense in furnishing appliances which are prohibitory either by the extreme cost or frequent renewals, which by frequency of the renewals of such appliances would compel the employer to close his enterprise. If you therefore believe that it was not practicable for the employer to insulate the wires and keep them insulated as against shock at the place of the injury, then I instruct you, as a matter of law, that it was not the duty of the employer to attempt to insulate the wires with weather insulation and you cannot consider his failure to so insulate the wires and keep them insulated as negligence.

If the court refuse to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

#### VIII.

Some testimony has been introduced as to rubber gloves and as to insulated nippers and as to body protectors.

I instruct you that the evidence fails utterly to show that the presence of insulated nippers or body protectors would have prevented the injury. You will,

therefore, disregard this evidence for no negligence of any employer is ground for liability unless such negligence caused injury.

If the court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following:

IX.

As to rubber gloves, I instruct you that if you believe from the evidence that the nature or character of the work in question was such that rubber gloves were not an essential requisite, then failure to furnish them would not be negligence.

I instruct you further that if you believe from the evidence that the employer did not know that Johnnie Bisher was working on the poles or among the wires, then the master would be under no obligation to furnish him any protection.

X.

I further instruct you that if you believe from the evidence that the master offered to or was ready and willing to furnish rubber gloves to his employees who were working among the wires, and that such employees knew it and failed to request them, then the fact that they were working without rubber gloves would be their own voluntary choice or way and the employer would not be liable for the injury and the verdict in this case would be for the defendant.

If the court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

## XI.

I instruct you further that the testimony in this case shows that the defendant, Betts, is a resident, citizen and inhabitant of Oregon, and plaintiff is also a resident, citizen and inhabitant of the State of Oregon; the court, therefore, has no jurisdiction of this case and you are directed to return a verdict for the defendant.

If the court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

## XII.

I further instruct you that the evidence in this case does not show that Harry Harbet had any right or authority to control or order Johnnie Bischer in the discharge of his duties, except such as pertained to sending up material and carrying same from pole to pole. Harry Harbet was not a foreman, he was not a person in charge of the work or any part thereof, he was not discharging any duty of the master in relation to Johnnie Bischer did in mounting the poles or attempting to learn the work of an electrician or attempting to do any thing in or about the wires was of his own voluntary choice or selection, and he cannot recover in this action, and your verdict must be for the defendant.

If the court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

XIII.

I instruct you that the evidence shows that Johnnie Bischer knew the current was on these wires, also the volume of voltage and that said wires were alive, and if you believe that his duties as supply boy did not require him to work among the wires or on the poles but that he was acting outside his duties as supply boy, then I instruct you that he assumed the risk of danger, and if he was injured outside the scope of his duties as supply boy then he assumed the risk of the injury and he cannot recover, and your verdict must be for the defendant.

CALLAHAN and LITTLEFIELD & SMITH,  
Attorneys for Defendant.

And now, in furtherance of justice, and that right may be done the defendant, Robert M. Betts, Receiver, who tenders and presents the foregoing as his Bill of Exceptions in this case to the action of the Court and verdict of the jury and prays that same may be settled and allowed and signed and sealed by the Court and made a part of the record, and the same is accordingly done this 9th day of Sept., 1913.

CHAS. E. WOLVERTON,  
Trial Judge.

[Endorsed]: Bill of Exceptions. Filed Sept. 9, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

## [Evidence.]

(Statement of case by Mr. Richardson.)

Mr. SMITH: Before counsel closes, in order to clear the record, I want to see that we understand. I understand him to state that he bases this action upon the Employers' Liability Act. Is that right?

Mr. RICHARDSON: That is right.

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Mr. RICHARDSON: There is not any attempt on the part of the plaintiff in this case, by the service of any summons to hold anybody, to charge any one with negligence, or to bring this action, or to prosecute this action against any one except Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon.

COURT: You sue him as receiver?

Mr. RICHARDSON: Sue him as receiver, and him alone.

COURT: I understand you do not sue him personally?

Mr. RICHARDSON: No, your Honor, not personally.

COURT: You expect to hold the Mines Company through him as receiver, and not personally?

Mr. RICHARDSON: Yes, your Honor.

COURT: I suppose that will be admitted, that Mr. Betts was receiver?

Mr. SMITH: Oh, yes, your Honor.

It is agreed between counsel that the record in the suit of Hamilton Trust Co. v. Cornucopia Mines Com-

pany (No. 3869), filed in this court June 14, 1912, may be considered admitted, and either side may read any portion of it.

JOHN BISHER, Jr., called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows.

Direct Examination.

Questions by Mr. RICHARDSON:

Johnnie, where do you live?

A. I live at Halfway, Oregon.

Q. Now, talk loud enough, Johnnie, so the jurors can hear what you have to say. How long have you lived at Halfway, Johnnie?

A. About 11 years.

Q. 11 years. How far is Halfway from the Cornucopia Mines Company?

A. Oh, I should judge about 13 miles.

Q. About 13 miles?

A. Yes, sir.

Q. What is that—a wagon road? Just a wagon road to the mines?

A. Yes, sir, a wagon road.

Q. No other transportation facilities except by team or automobile?

A. That is all.

Q. Do you know Mr. Robert M. Betts, Johnnie?

A. Oh, I have known him about six years.

Q. About six years?

A. Yes.

Q. Where has Mr. Betts been residing during that six years?

A. Part of the time at the mines, and been outside some of the time. I don't know where he was then.

Q. Now, did you ever work for Mr. Betts?

A. Yes, sir.

Q. When did you first work for Mr. Betts?

A. A year ago last summer.

Q. What kind of work did you do?

A. Just outside work.

Q. Outside work. What do you mean by outside work, Johnnie?

A. Working on the road, carrying lumber, and cleaning up around, and cutting brush, and raking up the yards.

Q. How long did you work for Mr. Betts at that time?

A. I worked all summer until school started in the fall.

Q. What wages did he pay you?

A. \$3.00 a day.

Q. Well, when did you next begin working for Mr. Betts?

A. Last summer just after school was out.

Q. And about what time of the year was that?

A. About the first of June, I think.

Q. About the first of June of what year?

A. Last summer.

Q. Last summer—1912?

A. Yes, sir.

Q. Who employed you at this time?

A. Mr. Betts.

Q. In what manner did he employ you?

A. Well, I called him up over the telephone from where I was at school.

Q. What did he say to you?

A. He told me to come up when school was out—he would have something for me to do.

Q. Well, did you go up when school was out?

A. I went up home, and stayed about a week, and then went up there.

Q. And what did you do when you went to the mine?

A. Well, the first night I worked on the rock crusher.

Q. Who told you to work on the rock crusher?

A. There was a man going to go down to the dance, and the man was on the crusher said he would run the train while he went to the dance, and Mr. Bishop told me to work on the crusher.

Q. Mr. who?

A. Bishop. That is the superintendent.

Q. Then how long did you work on the crusher?

A. I think I only worked there that night.

Q. Then what did you do?

A. Then I worked down by the compressor room, wheeling out dirt.

Q. Worked down by the compressor room?

A. Yes, sir.

Q. How long did you work at that?

A. About three or four days.

Q. What kind of work were you doing around the compressor?

A. Wheeling out dirt, out by the side of the building.

Q. Then what was the next employment they gave you?

A. I went to working on the crusher then, for awhile.

Q. What did you do on the crusher?

A. Just shovelled the rock into the crusher.

Q. Shovelled the rock into the crusher. Then what work did they put you at?

A. Then I worked there till they shut down the mill, and started to tear out the floors, and taking out the old machinery. Then I went to helping do that. When they stopped the mill, then the crusher stopped. They put me down there then.

Q. How long did you work there, Johnnie?

A. Well, I worked there about a month at various jobs.

Q. What did you do next?

A. Well, they had torn all the floor out of the mill, and got all the machinery out. Then I was working out on the dump, where they were sifting rocks, to get rocks to put in the concrete for the concrete foundation for the new machinery.

Q. Then what did you do? What was the next work they gave you to do?

A. Well, I changed off on that work, digging trenches for more concrete foundation for the tanks, and I was working on the dump when the foreman told me to go down to the power house.

Q. What foreman?

A. Ed Mills. He was foreman of the outside men at the mill.

Q. What did he tell you to do?

A. He told me to go down to the power house; that Buxton wanted me down there to work on the line.

Q. And did you go down there?

A. Yes, sir. I started right down the hill then—just went into the building and got my hat, and started right down the hill.

Q. What did Buxton tell you when you got down there?

A. I went down to the town. I met Harry Harbert down there, and he told me to come over to the store, and he would get some tools there, and I asked him what he was going to do, and he said, we would wire a few houses before we worked on the line. And we wired a saloon, and then went over—he put in a light at the hall; I just handed him tools. And then we went, the next job, we went up to Mr. Betts' house and put some wires in his house. Then one day we went down to the power house, and Mr. Buxton told us what kind of a tie to put on the pole.

Q. Did he show you how to tie it?

A. He showed how to tie it. He had an insulator

there, and he also had a wire, and a tie wire, and he cut and wrapped that around the insulator, and showed—Harry Harbert just before that had figured out a tie, and Mr. Buxton, when we got down there, said that wouldn't do—and he showed us another one, and he said that that was the one he wanted to use. And we told him all right. And he told me to help Harry Harbert.

Q. He told you to help Harry Harbert?

A. Yes, sir.

Q. Then what did you do?

A. Well, we went up the road a little ways, and Harry fixed poles.

Q. What did Mr. Buxton tell you to help Harry Harbert to do?

A. He didn't say just what to do. He just said, help Harry. He said Harry would tell me what to do.

Q. He said Harry would tell you what to do?

A. Yes. That was down at the power house.

Q. Well, what did Harry tell you to do?

A. Well, Harry climbed the pole, and I just carried some of the tools along first, and he went up the pole and fixed three or four himself. Then he told me, he says, "Well, it is pretty hard standing up there so long." He said, "We will take turns about." He said, "You come up and fix one, and I will fix the next one." I said, "All right," because Buxton told me to do what he would tell me; that he would tell me what to do. He went up there, and told me to fix one and he would fix the other one. He said it would be

easier on both of us. We did that for a few times. He worked a day or two that way, and then he saw that was pretty hard standing up there so long for one man, and he said, "We will both come up at the same time." He says, "One can wrap one end of the tie wire while the other wraps the other." He said, "We can do it quicker," and he says, "We can watch each other at the same time," and he says, "Maybe we won't get no shock if we watch each other. Maybe it will make it safer." And that is the way we were doing when I was injured.

Q. Now, this last pole, who climbed this last pole first that way—climbed the pole on which you were injured?

A. Harry.

Q. What did Harry tell you to do?

A. He just told me to put some insulators in the sack, and tie it to the rope, and he would draw it up. Then he told me to come up and do as I had done before.

Q. Well, what did he tell you to do when you got up on top of the pole? Did you get on top of the pole?

A. Yes, sir. I just got so my head was up, oh, just up about between the wires, about like that (illustrating).

Q. And where was Harry Harbert at this time?

A. He was on the opposite side of the pole.

Q. He was on the opposite side of the pole?

A. Yes, sir.

Q. About the same distance up the pole?

A. About the same distance.

Q. What did Harry tell you to do?

A. Well, he just said to fix—he didn't say just what to do then, because he told me what to do before.

Q. What did he tell you to do before?

A. He told me to wrap one end while he wrapped the other. He says, "We can do it quicker."

Q. What did you do when you got up on top of the pole?

A. Well, he had already had one end of the middle wire, tie wire, unwrapped, and I unwrapped my end, and took the middle wire in my right hand and started to lift it over the pole, as we had been doing before.

Q. Why did you lift the wire over the pole, or did any one tell you to do that, Johnnie?

A. Harry told me to do that.

Q. What did he tell you to do that for?

A. Well, to keep it farther away, so it wouldn't be apt to touch the other wire.

Q. Now, what happened when you were lifting this wire?

A. I just started to lift the wire up with my right hand. I was standing just—the wires came nearly to my shoulders—just about that high. I had to get up high enough, because they were pretty heavy. I just started to lift up the middle wire, and that is the last I remember.

Q. Johnnie, what tools or appliances did Mr. Betts furnish you with at the time that you were set to work

upon the line, if any?

A. I never worked on the line before excepting just this time.

Q. A little louder Johnnie.

A. I never worked on a line before until this time.

Q. Did they furnish you with any tools?

A. Well, Mr. Harbert, Harry Harbert, gave me a pair of climbers and a belt, and a pair of pliers.

Q. The pliers, did they have insulated handles?

A. No, sir. The pair of pliers that he gave me, they were dull, and the climbers were dull, and I sent down home and got a pair that I had used in climbing telephone poles, they were sharp, and the pliers, and the belt—I wore the belt that he gave me. And the pliers I sent down home and got a pair of pliers, because those that he gave me were old, and I couldn't use them, and they were so large I couldn't hardly use them.

Q. Did you try to use the climbers that he gave you?

A. I climbed one pole with them.

Q. Why couldn't you use them?

A. They were too dull. You cannot use climbers when they are very dull. You might slip. I climbed the pole right in front of the store when we was putting the lights in the saloon.

Mr. SMITH: We move to strike out all this testimony about the climbers and the belt and the pliers, for the reason that there is no risk alleged to have been occasioned by them at all. It simply encumbers

the record.

COURT: I understand they allege that he was not supplied with the proper utensils.

Mr. RICHARDSON: That is it, your Honor.

Mr. SMITH: But, if your Honor please, there is no charge he was hurt by reason of it. His charge is he was hurt by electric shock. He doesn't claim that they had anything to do with the shock.

COURT: I will overrule the objection.

Mr. SMITH: Note an exception.

Q. Johnnie, were you furnished a pair of rubber gloves?

A. No, sir.

Q. Did you see any rubber gloves?

A. I never did see a pair.

Q. Johnnie, had you ever worked on a transmission line, or any other lines that carried a dangerous voltage of electricity, before?

A. No, sir. I never had worked at electricity.

Q. Now, how far is it from the power plant to the stamp mill?

A. About a mile—

Q. The place from where they generate the electricity to the place they operate machinery with it?

A. I think it is about a mile and three quarters by the power line.

Q. About how many posts?

A. Oh, I should judge about seventy-five.

Q. About seventy-five posts, which the insulators were on?

A. Yes, sir.

Q. How many wires were strung upon the support carrying this electricity, Johnnie?

A. Three.

Q. Three wires?

A. Yes, sir.

Q. Now, what was the length of the cross arm?

A. About four feet.

Q. What kind of wires were they?

A. Copper.

Q. About how large?

A. Oh, about a little bit larger than a lead pencil.

Q. A little bit larger than a lead pencil. Were they naked wires?

A. Yes, sir.

Q. No insulation on them?

A. No, sir.

Q. What voltage of electricity were these wires carrying to the mill, being transmitted over these wires?

A. Well, I had been told 2300.

Q. 2300 volts?

A. Yes, sir.

Q. Are these transmission wires strung across any public highway, Johnnie?

A. Yes, sir. They cross the road between the town of Cornucopia, and the valley, and then they cross the road again between the town and the mine.

Q. Are there very many people travel that road?

A. Oh, the stage passes it twice a day, and then

there is about a dozen teams every day—freight teams, and the other teams, lumber.

Q. Are there very many people living around in that immediate vicinity?

A. Oh, I should judge about 500 people all around Cornucopia and the mines.

Q. Were there any houses near where you were hurt?

A. One about 200 yards.

Q. Anybody living in the house?

A. Yes, Mr. Panter.

Q. Did Mr. Buxton, the foreman, at the power house, give you any orders, Johnnie?

A. He just told me to help Harry; that he would tell me what to do.

Q. That Harry Harbert would tell you what to do?

A. Yes, sir.

Q. What did Harry tell you to do?

Mr. SMITH: That has been gone over, I think, if the Court please, by the examination this morning, and several of these last questions.

Mr. RICHARDSON: I think, your Honor, it may be that it has, but I was not sure. I believe I would like to have him answer this, to get this part of his testimony clear, and then I will not be guilty of any repetition.

COURT: Very well. He has gone over it. But if you want to make it clear, go ahead.

Q. Now what was the answer to that question?

A. You mean, what did Harry tell me to do?

Q. Yes.

A. When I first started to work with him, I just carried insulators and wires, and he went up the pole himself. Then after working about three or four days, or not quite that long, I guess,—

Q. A little louder.

A. After we had worked about two days, then it was pretty hard work for one man, he said, and he said it got tiresome up there, he said we would take turns about. He said I could climb one and fix it, and he would climb the next one. So we did that for a time. And then one man standing up there so long would get tired, and he said, "We will both go up at the same time." He said one could wrap one end of the tie wire, while the other wrapped the other end; we would do it quicker; and he said we could watch each other at the same time, and wouldn't be so apt to get a shock. So that is what we were doing when I was injured. We were both up the pole.

Q. Now, Johnnie, does that look like a cross arm?

A. Yes, sir.

Mr. SMITH: We have produced that, and state that it is the identical cross arm on which this injury happened.

COURT: Very well.

Q. Does that look like the cross arm?

A. Yes, sir.

COURT: That is already admitted. You need not go into it.

Mr. SMITH: It is the identical cross arm. We have produced it as such, and counsel can use it.

Mr. RICHARDSON: I want to find out from him if it looks like the same one.

COURT: It is already admitted. It is not necessary to prove further.

Mr. RICHARDSON: They might admit it, and it might not be the one, and before I receive it as such—

COURT: Do you know it is the one?

Mr. RICHARDSON: No, I don't. I was just asking him.

COURT: Do you know that is the one?

A. I couldn't say that that is the one, because there is so many.

Q. Does it look like the one?

A. It is just about the same.

Q. Were those four pegs in the one you were working on?

A. Yes, sir.

COURT: It is not necessary to take up time with that.

Mr. RICHARDSON: If they say that is the identical one, that will be sufficient.

Mr. SMITH: Yes, that is the one, Mr. Richardson.

Q. Johnnie, come down and explain to the jury where these transmission wires were fastened to these insulators.

A. This one we had already changed. That was

already changed. One wire was on this one, one on that end insulator. And before I went up the pole, Harry had taken the wire off his side of this insulator, and I come up—I took it off this side. And I started to lift this wire up with my right hand.

Q. Now, here is the pole.

A. The pole is right here.

Q. Right here. How wide was that pole?

A. About eight inches. I started to lift this wire up with my right hand, and lifted over the pole, to get it far enough from this one so we could fix this one without being too close, having the two too close together. And I just started to lift that wire up to lift it over the pole. Those wires are pretty heavy—I would sometimes have to get pretty close to the wire to lift it—about two hundred feet to lift. I just started to lift that wire up with my right hand. I remember of being up just high enough so I could lift pretty good, and that is the last I remember. I just realized I was getting a terrible shock, and I don't remember no more.

Q. Now, Johnnie, how much would you have to lift? You say that wire was a little heavy. About how much would you have to lift to lift that wire over the end of the pole here to get it over on this side?

A. About 75 pounds or 100.

Q. And you were trying to lift that with one hand?

A. Yes.

Q. And where were your feet?

A. Down on the pole. I had my feet, had climbers on, and my feet was stuck in the pole.

Q. Kind of astride of the pole?

A. No, just on the side of it, about like that.

Q. And you were lifting this middle wire?

A. Yes, sir.

Q. Why were you lifting this middle wire over here, Johnnie?

Q. Well, Harry told me we would lift it over, and that would make it further away from this one, so we could fix this one without getting a shock.

Q. When you were lifting this middle wire, did you use one or both hands?

A. I just started to lift that one with my right hand, one hand.

Q. And then you were between these two wires?

A. My head was between these two wires.

Q. Who told you to do it that way?

A. Harry Harbert.

Q. Where is Harry Harbert?

A. Standing there (pointing to Harbert).

COURT: You had your head, I understand, between the two wires?

A. Yes, sir.

COURT: Then your shoulders were not above the wire?

A. No, sir, there wasn't room enough. I couldn't get in between them to stand square.

COURT: Do you know the distance between those two wires?

Mr. RICHARDSON: Twelve inches.

Mr. SMITH: Twelve inches what—centers?

Mr. RICHARDSON: Twelve inches from post to post, I presume, or from one insulator to another.

Mr. SMITH: Well, if he knows, ask him. See if he knows.

A. That is the one. Measure it.

Mr. SMITH: How is that?

A. That is the one—measure it.

Mr. SMITH: Well, do you know without measuring it?

A. I never measured them. I never have been back there since.

Mr. RICHARDSON: About twelve inches.

Mr. SMITH: Twelve inch centers.

Q. Now, Johnnie, what happened to you when you got that sudden shock?

A. I just remembered that terrible feeling went through me. I cannot describe it, because it is pretty severe. Then the next thing I remember I thought I was dead.

Q. Then what was the next thing you remembered?

A. Then the next thing I remember, I was hanging down between the telephone wires, and there was bubbles rolling out of my mouth, and I tried to see, and everything looked white. Then in a short time, a little bit after that, I heard Harry Harbert tell the boy that came up with the wagon just then—told him to catch me. And I realized that if he would drop me,

it might hurt me, and I put my arms around the pole. My hands were gripped tight, my arms just about in this shape. I put my arms around the pole, and slid down.

Q. Then what did they do to you? What did you find wrong with you when you hit the ground?

A. My arms just felt like they had both been cut off right about there, and I couldn't hardly stand the pain. I would just yell all the time. And the boy carried me to the wagon, and put me on the wagon, and took me up town, where Dr. Walsh dressed my arm.

Q. Now, Johnnie, come down and we will show the jury the extent of your injuries. (Witness shows the jury his arms).

Q. Now, Johnnie, how was this right hand? Hold one hand and your arm out. How was this hand burned before they removed it?

Mr. SMITH: You mean the right hand, so we will get it into the record.

Mr. RICHARDSON: The right hand, that is off.

Q. What was the condition of that hand before they removed it?

A. The first I noticed it when I got down off the pole, I noticed that that first finger on the right hand had been burned in two—the first finger right across there.

Q. In what shape?

A. Like the wire had been burned right into it.

Q. The size of the wire?

A. A little larger than the wire, because it burned

a little wider.

Q. And about how deep?

A. About half an inch deep.

Q. In your right hand?

A. Close onto about there.

Q. Right through the palm of the hand?

A. Yes. That finger was nearly burned in two. A day or two after that, the skin began coming off both wrists right along there.

Q. Now, what was the condition of this hand, the left hand?

A. This one was just burned right on the side. The wires come in contact there, and it was black.

Q. Around the wrist?

A. On the wrist.

Q. Now, what about your suffering during that time?

A. I cannot describe it.

Q. It hurt, did it?

A. It hurt terribly. I walked the floor for two days and two nights without any sleep. I couldn't hardly stand it.

Q. Now, show this hand to the jury. What was the condition of your muscles at the time you received this burn?

A. Well, the muscles on my wrists here on this hand and along there was just in knots. Both hands just gripped as tight as they could, and both arms was set, something like that. I couldn't move them out of that way. I couldn't straighten the fingers.

When I got up to town, Dr. Walsh and Ranse Ladd, the man sitting there, just took my hands and rubbed my hands, tried to straighten them out, rubbed those, rubbed my arms here to start the circulation and try to straighten those fingers—the fingers on both hands gripped so tight.

Q. Did the doctor give you any morphine to try to ease your pain?

A. I don't know. He put something on each arm.

COURT: Before you put that on (the covering of the arm) let him cross examine him as to his physical condition. Then he won't have to take it off again.

#### Cross-Examination.

Questions by Mr. SMITH:

Will you show your left hand, please. Let us see the palm of your left hand.

Mr. RICHARDSON: Get up close to it, and let the jury examine it.

A. That is as much as I can straighten the fingers, only those two. The little one I cannot hardly move at all. The wire burned the two—the wires came in contact right there.

Q. What made this across this elbow?

A. I don't know what did that. The same way in this one.

Q. It is not as bad in the right elbow joint as in the left?

A. No, sir.

Q. Doesn't that look to you like a wire?

A. The doctor said that was not a wire burn.

Q. Do you know what part of the wire you touched with your left arm, or what part of your left arm touched the wire?

A. I don't remember anything about it. The last thing I remember was when I started to lift up the wire with my right hand.

Q. You don't know how you were hurt?

A. I don't know how this came in contact, this hand, at all.

Q. You do know that you had to touch two wires to get a shock, don't you?

A. That is what Mr. Buxton told me.

Q. They always told you not to touch two wires?

A. Yes, Mr. Buxton told me.

Q. You didn't have any duties that required you to touch two wires, did you, at the same time?

A. No, sir.

Q. You knew those wires were live, didn't you?

A. Yes, sir. He told me they were 2300 volts.

Direct Examination Continued.

Q. Johnnie, what use can you get of your left hand there? What happens if you turn it around when you try to use it?

A. Well, if it turns too far, so it will slip, it hurts—turn it over too far. Sometimes I turn it over to make a change—sometimes I turn my hand too far like that quick, and it slips in here some place, and it hurts about two hours.

Q. Does the stump there ever pain you?

A. It hurts all the time, in the joint, right across there.

Q. What about your ears—anything wrong with your head since you got that?

A. Well, there is something wrong with it. It never bothered me before, and since then, there is a little pus or something that runs out of them. I have to keep working them all the time.

Q. You have to keep working them all the time?

A. Yes.

Q. What does the doctor say?

Mr. SMITH: Objected to as incompetent. The doctor can testify.

COURT: Yes, the doctor can testify.

Q. I just want to ask him one other question. You don't claim, do you, Johnnie, that your head came in contact with the wire?

A. No, sir. I was just up between the wires—I was just about that high. My head was about that high above the wire.

Q. There is no other mark on your body to show where you touched the wire, except on your arm, is there?

A. Just my arm.

Q. Now, Johnnie, what did they do with you when you were hurt, after you were hurt?

A. Do you mean when I was up on the pole, to get me down?

Q. No, after you were down from the pole, and after you were over in Halfway, what did they do to

you there?

A. They didn't do anything. The doctor there dressed my hands.

Q. He dressed your hands. Then what did they do with you?

A. Then in about two days I came to Portland—came down here.

Q. You went home first?

A. At Halfway is my home.

Q. How soon did they take you home?

A. I was hurt in the morning about ten o'clock. In the afternoon about two o'clock, I think.

Q. What day of the week was this, Johnnie?

A. Sunday.

Q. It was on Sunday morning at ten o'clock?

A. Yes, sir.

Q. And where did they take you, when they took you from Halfway?

A. They took me down to Robinet, and took the train and came down here to the hospital.

Q. How long were you injured before you arrived in Portland?

A. Four days.

Q. Four days?

A. Yes, sir.

Q. What hospital did they take you to, if any?

A. Good Samaritan.

Q. Good Samaritan. How long were you there, Johnnie?

A. About three months.

Q. About three months. What physician and surgeon treated you when you were at the hospital?

A. Dr. Taylor. When they amputated my arm, Dr. Jessup helped him.

Q. Well, did you suffer very much, Johnnie, during that time?

A. Well, I should say so.

Q. Did they give you anything to keep you from suffering?

A. Gave me morphine, all they dared to.

Q. During the time you were in the hospital, had you been able to dress yourself, and take care of yourself, during any of that time?

A. Not then. Just in the last—just in about the last month I can put my coat on, and pull my pants up, and button my shoes. I cannot put on my collar yet. I cannot fasten my collar buttons, or anything like that.

Q. How old were you, Johnnie, on the 28th day of last July?

A. I was 18 the May before that.

Q. You were 18 years of age in May?

A. Yes, sir. That was about two months before.

COURT: That is 1912?

A. Yes, sir.

Q. You were 18 years old on the 8th of May, 1912?

A. The 25th.

Q. The 25th day of May, 1912?

A. Yes, sir.

Q. And you were injured on the 28th day of July,

1912?

A. Yes, sir.

Cross-Examination.

Questions by Mr. SMITH:

Now, in examining you, Johnnie, I want to get at the facts of the case as you understand them, and if you don't understand any question I ask you, say so, and we will try to make ourselves plain. Now, how long had you been working, as you claim, at putting these insulators on?

A. Well, we had been working off and on, I guess, about a week.

Q. And you had been doing that work, had you?

A. I had been helping Harbert do it.

Q. These wires were the same distance all the way along, weren't they?

A. Yes, sir.

Q. And neither you nor Mr. Harbert had met with any mishap because of these wires before, had you?

A. No, sir.

Q. There was always plenty of room before this time, wasn't there?

A. Well, several times I nearly touched them.

Q. But you never did, did you?

A. Never did.

Q. Now, you knew when you were working there that these were high tension wires?

A. Yes, sir.

Q. And carrying a high voltage?

A. Yes, sir.

Q. You were cautioned not to touch two of them at the same time?

A. Yes, sir.

Q. And you were also cautioned not to touch Harbert if he had his hand on one wire and you had yours on the other?

A. Well, he didn't say anything about that.

Q. He didn't?

A. No, sir.

Q. Now, if you will trust me to make this measurement, I will make it. If not, you just watch me and see that I am right. Now, between these outer pegs, we call that twelve inch center—that is very close. Isn't it true that when this wire was running along from pole to pole that this wire was on the inside of this insulator?

A. Well, sometimes it was and sometimes it was on the other side.

Q. And the other one would correspondingly be on the outside of the outer insulator? That is to say, the wires were not on the inside of the insulator at that time, were they?

A. I don't know whether they was on the inside or outside. They were put on different ways.

Q. You were changing from this glass insulator to this pottery insulator, weren't you?

A. We were taking those glass insulators off, and taking the pegs out, and putting new pegs in, and instead of those glass insulators, we were putting on

these porcelain ones.

Q. Do you remember at the time that you were hurt, whether the porcelain insulator was in place on this outer peg?

A. No, sir, I don't.

Q. You don't know that?

A. No, sir.

Q. Do you know whether it was in place on this other outer peg?

A. I don't think we had fixed that one yet.

Q. You don't know, though, do you?

A. I don't know.

Q. Now, of course we have different views of this matter, but don't you now remember that when you were hurt, the wire that was on this second peg from the left hand side was already lifted over the pole, and was placed down safely behind this second peg from the right hand side as you faced it?

A. No, sir. I started to lift it over there myself.

Q. Now, between these pegs, from the outer peg on either side of the pole, across the pole in the center and beyond the second peg from either end is a distance of 30 inches, is it not, approximately?

A. Just about.

Q. And you had seen Harbert work with these wires, right along, hadn't you?

A. Yes, sir.

Q. Were you studying electricity at that time?

A. Just had a little bit in school—physics.

Q. Naturally you wanted to find out all you could

about it, didn't you?

A. I didn't want to find out there. I intended to go to an electrical school after.

Q. You have always wanted to be an electrician, haven't you?

A. Yes, sir.

Q. And of course, what you could find out, you wanted to learn as much as possible, didn't you?

A. I wanted to learn everything that I could.

Q. How large was this pole to which the cross arm was attached?

A. I think the top of it was about eight inches.

Q. Did Harbert ever tell you that two men on the pole made it more dangerous?

A. No, sir. He told me just the opposite.

Q. That it made it safer?

A. He said that we could watch each other, and we would not be so apt to touch it.

Q. Now, at the time you were hurt, you had on climbers, didn't you?

A. Yes, sir.

Q. These sharp peg things that you climb with?

A. Yes, sir.

Q. And you had on a big strong belt?

A. Yes, sir.

Q. You say those were your own climbers?

A. My climbers.

Q. And they were sharp?

A. They were sharp, yes, sir.

Q. So your feet didn't slip, did they?

A. No, sir.

Q. And your belt didn't slip?

A. No, sir.

Q. How long had you known that those wires carried that voltage? Did you know it every day you worked there?

A. Oh, I had known it ever since I had been in the country—I heard that.

Q. Of course you had known that electricity was very dangerous, haven't you?

A. Yes, sir.

Q. Now, you speak of rubber gloves. Will you show us—just pull up—excuse me, I will, if you will let me—how high up do the rubber gloves come?

A. I don't know. I never seen any.

Q. Don't you know that Harbert wouldn't work with rubber gloves, because it was more dangerous with them than without?

A. I didn't know.

Q. Don't you know that?

A. I didn't know it.

Q. Do you know whether or not a man's hands will sweat in rubber gloves?

A. Well, I suppose they would.

Q. And his arm will correspondingly sweat?

A. Well, that is reasonable.

Q. And you know also that if your hand is wet, or your feet are wet, you know that a damp surface catches electricity, or conducts it, quicker than dry, doesn't it?

A. I noticed that, because when I would handle the wire, I would have just begun to start to let loose of it, and my hands would be moist, the sparks would follow my fingers—just touch them.

Q. Frequently in handling the wire you would wipe your hands off, wouldn't you?

A. Yes, sir.

Q. So would Harbert, wouldn't he?

A. Yes, sir.

Q. Now, do you know the object in changing from this type insulator, the glass insulator, to the crockery one?

A. Well, he said so it would be a better insulator.

Q. Did he tell you why?

A. Yes.

Q. Why?

A. Because he said they were going to put on larger—put on a higher voltage over the same wires, and had to have higher insulation.

Q. So you know enough about electricity to know they can do that, don't you?

A. That is what he told me.

Q. That they can so handle it so they will put on higher voltage over the same sized wire?

A. Yes, sir.

Q. Do you know what they call that?

A. Putting higher insulation on.

Q. I know. But what process is it they call it in handling electricity so they can put higher voltage over the same wire than the wire was carrying before?

A. I don't know?

Q. Did you ever hear about stepping the current up?

A. I heard about that in Physics. I read that.

Q. You have heard about stepping up transformer, haven't you?

A. Yes, read about that.

Q. And you knew at the time what was meant by stepping the current up?

A. No, sir, I didn't know it then. I just learned it last year.

Q. You have been studying electricity since, have you?

A. Just in Physics.

Q. But you did know that they were trying to fix this so that the same sized wire would carry a good deal heavier current.

A. That is what he told me was the purpose.

Q. Now, you spoke of a conversation with Mr. Buxton? Did he ever give you any climbers?

A. Mr. Buxton?

Q. Yes.

A. No, sir.

Q. Did he ever tell you that it might become necessary for you to climb the pole?

A. He told me just to help Harbert.

Q. Well, now, will you kindly answer my question? Did Mr. Buxton ever tell you that you might have to climb the pole?

A. No, sir.

Q. Didn't he hire you because he knew that you understood how to climb a pole? Wasn't that one of the reasons he hired you?

A. I don't know. I never asked him.

Q. Had you ever worked for a telephone company or this company before?

A. I had worked for this company, yes, sir.

Q. Had you climbed the poles before this?

A. Not these poles.

Q. No, any poles, I mean?

A. I had climbed telephone poles.

Q. You knew how to handle the climbers, didn't you?

A. Yes, sir.

Q. And you knew how to take care of yourself on a pole, didn't you?

A. Yes, sir, a telephone pole, where there is one wire.

Q. How long did you climb telephone poles before you were hurt over here at these poles?

A. I have climbed a little—well, my father has owned a line for five or six years, and I would come home a little while, and I would climb maybe a week, help him remodel his line. Then I wouldn't climb any more that year. Next year maybe I would climb about the same time. So I climbed about a week out of each year, I suppose, for three or four years.

Q. So then you had been in the habit of climbing telephone poles for quite a little while, hadn't you?

A. Yes, I had climbed telephone poles.

Q. And using the belt?

A. Yes, sir.

Q. And these climbers?

A. Yes, sir.

Q. Now, isn't it true, or do you remember now, Johnnie, didn't Mr. Buxton, at the time he gave you that pair of climbers that you spoke of—

A. He didn't give them to me.

Q. Who did?

A. Harbert.

Q. Did Mr. Buxton ever tell you that one reason they wanted you was that you knew how to climb the poles?

A. He never told me that.

Q. And that in working with Harbert, if anything happened to Harbert, you could get up the pole and save him?

A. No, sir.

Q. Anything of that kind?

A. He never told me that.

Q. Don't you know that that was all in the world they wanted with you, so far as pole climbing was concerned?

A. I don't know what they wanted me for there. He just told me to go down there. He told me to help Harbert.

Q. Now, do you remember what happened after you got that shock?

A. Well, when I first regained consciousness, I asked Harbert how I did it. He said he didn't know.

Q. You don't know either?

A. I don't know either.

Q. You know enough about electricity to know that when there is a short circuit, there is a flash, or is there not?

A. I don't know.

Q. Is there a flash under that circumstance? Suppose a man's arm, both of them, come in touch with one wire, and one the other, would it be a flash, or anything of the kind?

A. I don't know whether it would about that, or not.

Q. Have you worked on the pole when you would be adjusting this side of the wire, or tying it in, and by twisting with the nippers the end of the wire would touch the other wire and cause a flash?

A. No, sir, we kept it from doing that as much as we could.

Q. You were careful enough not to do that, weren't you?

A. Yes, sir.

Q. You never saw Harbert that careless, did you?

A. No, he never touched it either.

Q. Now, do you know whether, as quick as you got in trouble, Harbert struck your hand and knocked it off the wire?

A. I don't know anything about it.

Q. You don't know what happened at all after you got shocked?

A. I don't remember anything after I started to

lift up the middle wire.

Q. And you cannot tell the jury now how you happened to lift up these two wires?

A. No, sir, I can't do it.

Q. No duty you had required you to touch two live wires at the same time?

A. No, sir.

Q. Now, as I understand you, Johnnie, you were working on this side of the pole, were you?

A. Yes, sir. I was facing Harbert and the pole was, to my knowledge, I think the line run in this direction.

Q. Ran north and south?

A. Yes, sir. And I was standing facing that way

Q. Facing north?

A. Yes, sir.

Q. Then, if we would turn this around, we would have the situation, wouldn't we, about like that?

A. Yes, sir.

Q. And you claim you were standing on that pole with your head up just between these wires, just about to your chin?

A. Just between those two.

Q. Was the pole immediately in front of you, or were you the other side of the pole, do you know?

A. The pole?

Q. Yes.

A. I don't remember. I was just facing that way. I don't remember whether the cross arm was toward me, or not.

Q. Now, when you were trying to lift this wire from off here, was the insulator on that peg at that time?

A. Yes, sir.

Q. Did you help loosen it?

A. I loosened this side of it, the wire on this side.

Q. And then you tried to lift this wire when you were in a position when your head was about this high? Is that it?

A. Yes, sir.

Q. And you were still on this pole over here—you tried to lift it with your right hand, is that it?

A. Yes, sir.

Q. Up this way and over the pole?

A. Yes, sir.

Q. Where was your left hand?

A. I don't know. Sometimes they were heavy, and if we just had to lift them straight up, I would lift them with both hands.

Q. Was Harry trying to help you lift that thing?

A. I don't remember whether he was or not.

Q. If he was, of course, it would very materially lessen the weight that you were trying to lift, wouldn't it? That would be stretched between two poles, wouldn't it?

A. Yes, sir.

Q. And if he was on one side lifting, and you on the other side lifting, it would make it much lighter, wouldn't it?

A. Yes, sir.

Q. And you don't know whether that was the situation or not?

A. I don't think he had hold of the wire at all, but I don't remember for sure.

Q. Now, at this time that you say that Mr. Buxton showed you how to tie the wires—

A. It was down at the power house.

Q. How long was that before you got hurt?

A. Oh, I think about a week. Not quite that long.

Q. Did he show you that in order to teach you how?

A. Well, when I was up to the town, Harbert had figured out a tie, and he took it down to Buxton. Buxton said that wasn't the tie that he wanted, and Buxton showed Harry Harbert and I a tie right in front of the house.

Q. Well, now, was he showing you, or was he showing Harry Harbert?

A. I don't know whether he was showing me or not.

Q. You didn't?

A. No.

Q. Isn't it the fact that he was explaining to Harry Harbert how to tie this wire on this new insulator, and that you were just simply an onlooker?

A. That is the kind of insulator he was showing it on.

Q. I don't think you understood my question. I think you are trying to answer my questions. What I am asking you is, if Mr. Buxton was showing Harry

Harbert how to do the work.

A. I don't know whether he was showing—

Q. And you looked on? Isn't that it?

A. He didn't say who he wanted to see it.

Q. I didn't ask you whether he said whom he wanted to see.

A. I say, he didn't say who he was showing—who he wanted to see.

Q. But he was telling Harry Harbert, because Harry Harbert was the lineman, wasn't he?

A. He was talking to both of us.

Q. Buxton never told you at that time that he wanted you to do any tying of these wires?

A. No, he didn't tell me to tie wires.

Q. He never at any time told you to tie wires on those insulators, did he?

A. He didn't tell me to do anything only to help Harry.

Q. And you know he was depending on Harry to tie the wires, and do the work on the insulators, wasn't he?

A. I don't know whether he was or not.

Q. That was what he was hired for?

A. It was what Harry was hired for, I suppose.

Q. You were hired to carry the things along the ground, weren't you?

A. I don't know. He never told me what I was to do.

Q. Who hired you? Do you know for whom you were working at that time?

A. Mr. Betts hired me.

Q. Well, do you know? It was him himself, was it?

A. I called up over the telephone.

Q. Now, something was said here this morning about Mr. Betts running that mine as lessee. You knew that he was running it away along in November, didn't you, before November?

A. I knew that he was manager there.

Q. You have been up at the tunnel at the mine, haven't you?

A. The tunnel?

Q. Yes.

A. Yes, sir.

Q. You have been at the mill?

A. Yes, sir.

Q. You have been at the office?

A. Yes, sir.

Q. Did you ever see those notices that were posted there stating who was running that mine, that Mr. Betts was as lessee?

A. I never noticed it, never stopped to notice. When I went in the office, I just went after my check.

Q. You, of course, could write before you were hurt?

A. Yes, sir.

Q. You wrote right-handed too, didn't you?

A. Yes, sir.

Q. Would you know your signature, if you should see it?

A. I am pretty sure I would.

Q. I will ask you if your name was signed to that paper by yourself.

A. Yes, sir.

Q. And did you notice at the time that that was Mr. Betts lessee?

A. I never noticed.

Q. His name being there?

A. I never noticed that.

Q. This is a receipt for a voucher, isn't it? Or it is your voucher for work, dated July 15, 1912, about a week before you were hurt?

A. I don't know why I signed that.

Q. Well, it is a receipt, isn't it, acknowledging that you have been paid for your work?

A. I don't remember ever signing that, but I know the signature.

Q. Yes, that is your signature, isn't it?

A. Yes. I don't remember ever seeing those little slips like that on the one I signed.

Q. And Mr. Betts' name is Robert M. Betts, just like that is there, isn't it?

A. I never seen that "Robert M. Betts, Lessee," before like that.

Q. You didn't notice that at the time? Is that it?

A. I never did notice it.

Q. His name is Robert M. Betts, isn't it?

A. I have seen that Robert M. Betts.

Mr. SMITH: We will ask to have this document identified. Then I will show it to Mr. Richardson.

Marked "Defendant's Exhibit A".

Q. You hadn't been out of school very long when you went to work for Mr. Betts there, had you?

A. Just went out of school before I started to work about a week.

Q. Now, after you were hurt, you went down and got your pay, didn't you?

A. No, sir.

Q. Were you ever paid for this work?

A. Well, they put money in the bank when I was down in the hospital.

Q. Then you didn't tell anybody to sign the payroll for you, did you?

A. No, sir. I don't know whether it has ever been signed.

Q. Is your memory plain as to what you were doing at the time you were hurt, about lifting that wire?

A. Just at that time, it is.

Q. It is very plain as to that?

A. I remember just as if it was a week ago.

Q. You know Mr. Buxton, don't you?

A. Yes, sir.

Q. And you know Harry Harbert pretty well, don't you?

A. I hadn't known him very long. I have worked with him up there and that is about the first I got acquainted with him.

Q. Do you remember shortly after you were hurt, that you were lying on the counter in the store?

A. Collar?

Q. Counter—lying on the counter in the store? You know where the store is, don't you?

A. Yes, sir. Yes.

Q. Do you remember that under the doctor's direction they rubbed your muscles very thoroughly to get the knots out of the muscles?

A. Yes, sir.

Q. Or get the convulsions out of it.

A. I remember that, because it hurt pretty bad.

Q. You remember that? You knew what was going on at that time, didn't you?

A. Yes, sir.

Q. After they did that, you remember that you went out for a walk, didn't you?

A. A fellow took me by the arm and ran me up and down the street.

Q. You remember that distinctly, too, don't you?

A. Yes, sir.

Q. Now, do you remember of talking to Mr. Buxton shortly after you were hurt, talking there in the store?

A. I think all he says is just told them what to do. That is all I remember talking to him about.

Q. Don't you remember that he came in, and you and Mr. Buxton were always pretty good friends, weren't you?

A. Yes, sir.

Q. Liked each other a whole lot, didn't you?

A. Yes, sir.

Q. He was walking up and down the store there

pretty much excited from your hurt, wasn't he?

A. I don't know whether he was or not. I was hurt so bad I didn't know nothing much.

Q. Did you ever make any remark at that time, in the presence of Mr. Buxton and in the presence of Mr. Harbert, when you were there, when he was walking up and down there, you said, "She is a hot one, Buck", something to that effect? Do you remember that?

A. No.

Q. To which he replied something to this effect, "Yes, when things get tangled up with 2300, it is pretty hot"?

A. I don't remember saying anything like that.

Q. You cannot deny that you did say it, can you, Johnnie?

A. No.

Q. Now, do you remember that after that you spoke to him and told him something to the effect "Don't feel so badly about it, Buck. It was my fault."

A. No, I don't believe I said that.

Q. What did you say?

A. I don't remember that I said anything.

Q. You don't remember whether you did or not now, do you?

A. I remember just about what was going on, but I don't remember saying anything like that.

Q. Now, you also remember that after you left that store, your mind is perfectly clear?

A. Yes, sir.

Q. How did you leave the store? In what vehicle or conveyance?

A. I didn't leave the store in a vehicle.

Q. Where did they take you after you left the store?

A. Took me up and down the street a little while, and then took me down the road afoot.

Q. Then where did you go?

A. Then in a short time an automobile came along and took me home.

Q. Whose automobile was it, do you know?

A. Batty's.

Q. Who went with you in that automobile, please?

A. Ranse Ladd, I think. Harry Harbert took me down as far as I walked.

Q. He took you down to where you took the automobile, didn't he?

A. Yes, sir.

Q. You remember that very distinctly, too, don't you?

A. Yes, sir.

Q. Now, right before you got in the automobile, or just about that time, did you not also tell Harry Harbert that you didn't know how it happened?

A. No.

Q. That you didn't blame anybody for it?

A. No, I never told him that.

Q. What did you tell him?

A. I didn't tell him anything.

Q. Anything to that effect?

A. No.

Q. Did you discuss with him whether you were careless or negligent at that time, or not?

A. No. All I said to him about how I was injured was when he just started to take me down off the pole. I said, "How did it happen?" That is all I ever said to him about it.

Q. Then did he tell you?

A. He said, "I don't know." He was pretty badly excited, and he said, "Oh, I don't know." That is all.

Q. Do you remember at that time whether he told you that he struck your right arm off?

A. He told me he kicked me loose.

Q. Kicked you loose?

A. Yes, sir.

Q. Did he also tell you that he struck you so hard to get you out of the wires that he himself fell from the pole, twenty feet or more from the ground?

A. Yes, he told me that.

Q. You remember that distinctly, don't you?

A. Yes.

Q. Then he came right back up the pole after you again, didn't he?

A. Yes, sir.

Q. Then he cut your belt and got you down the pole the best he could, didn't he?

A. He was going to cut my belt. I was just going to straighten up. Then he was going to cut my belt. That is the last I knew. I realized the other fellow couldn't catch me, and I put my arms around the pole.

Q. He didn't realize at that time he had got you out of the wires, did he?

A. I don't know whether he did or not.

Q. Do you know now or were you told then about this stepping up the current? How many times they were going to increase it?

A. No, I have learned that since.

Q. You have learned that since?

A. Learned that just about a month ago.

Q. You knew at all times when you were working there that 2300 volts was a very dangerous voltage, didn't you?

A. Mr. Buxton told me that if I shorted, it would kill me.

Q. Do you know what voltage is the least voltage that will kill a man?

A. No.

Q. Did you know then?

A. No.

Q. But they did tell you that 2300 volts would kill you, didn't they?

A. Mr. Buxton, the man sitting there, told me if I shorted the wires, touched two at once—

Q. That is what you mean by shorting the wires?

A. Yes, sir.

Q. That is what you call a short circuit, isn't it?

A. Yes, sir.

Q. So, when speaking of it, you say short and shorted the wires?

A. He said if I would short the wires that it would

kill me.

Q. You also knew that it was perfectly safe to work there as long as you did not touch two wires, didn't you?

A. I knew it was pretty hard to keep from touching them, though.

Q. Well, will you kindly answer the question? You knew it was perfectly safe to work with one wire and lift it back and forth, although it carried 2300 volts, if you didn't touch another wire, or make another contact?

A. Yes. He told me—Harry Harbert told me that one wire wouldn't hurt me unless it connected with the ground.

Q. You have noticed birds, haven't you, fly and light on these wires going across the country, when they had this current in, and they were not hurt when they only touched one?

A. I never remember birds sitting on the wire. They might do it.

Q. You know Mr. Ladd, too, don't you?

A. Who?

Q. Mr. Ladd, this gentleman here? Stand up, Mr. Ladd, if you please.

A. Yes, sir, I know him.

Q. How long have you known him?

A. Oh, four or five years.

Q. Did you talk to him down there in that store about how you were hurt?

A. No, sir.

Q. Did you tell him that you must have gotten careless?

A. No, sir.

Q. That nobody was to blame, or words to that effect?

A. No, sir.

Q. Did you tell him, or talk to him to that effect, when he was massaging your arm there?

A. No, sir.

Q. You spoke awhile ago that Mr. Ladd went down in the machine with you, too?

A. I think he did.

Q. Did you tell him in the machine—did you talk to him there about it, and tell him there that you didn't blame anybody, that you must have gotten careless?

A. No, sir.

Q. Or words to that effect?

A. I didn't talk about how I was hurt at all.

Q. Do you know Mrs. Gray? Do you know Mrs. Katherine Gray?

A. I don't know whether her name is Katherine or not. I know Mrs. Gray.

Q. Well, you know a Mrs. Gray that lives in that country up there?

A. Yes, sir.

Q. Did she visit you at the hospital?

A. Yes, sir.

Q. Did you talk to her about this injury?

A. A little bit.

Q. Did you tell her that you didn't know how it happened, that you must have gotten careless, that you didn't blame anybody, or words to that effect?

A. No, sir. I told her I didn't know how it happened.

Q. Concerning these pliers, you were not using pliers when you were hurt, were you?

A. I did just a little before.

Q. At the time you were hurt, you were not working with pliers, were you?

A. No, sir. I just started to lift up the wire.

Q. And the pliers that were used there by Harbert didn't have any insulated handles, or anything of that kind, did they?

A. No, sir.

Q. So you were not hurt by reason of the pliers?

A. No, sir.

Q. And at one time also you spoke of a pad, or a protection, I believe you called it a belly pad, that men sometimes use?

A. I didn't say anything about a belly pad.

Q. Well, it was brought out in the opening statement. Do you know where they use those pads, and under what circumstances?

A. No, never heard of a belly pad.

Q. You know that they don't use them out in that transmission work there, where there are only three wires up there, don't you?

A. I never seen any to know what they were.

Q. And you were not hurt by reason of not hav-

ing a pad in front of your body? It was your arms that came in contact with the wire?

A. Yes, sir.

Redirect Examination.

Q. Now, Johnnie, about these conversations that took place at the store immediately after you were injured. You say they took you up and down the road. What did they run you up and down the road for?

A. To keep me from going to sleep.

Q. Had the doctor at the store given you—

Mr. SMITH: I have no objection to counsel putting in his case, and conducting his re-examination, but I think he is too leading.

Mr. RICHARDSON: I didn't mean to be, your Honor.

COURT: Very well. Proceed.

Q. Now, Johnnie, you say they gave you morphine?

A. I don't know what it was. He shot something in my arms, and I began to feel sleepy after that.

Q. Then what did they do to you?

A. Then, to keep me from going to sleep, they ran me around the counters a few times.

Q. Were you feeling sleepy?

A. I kept wanting to lay down and go to sleep, and then they took me out on the road, on the street—ran me up and down the street a few times; and then pretty soon they started me down along the road to—

ward home on foot.

Q. What did the doctor do to you when they brought you to the store?

A. He laid me on the counter, and put some quilts under me, and started to rub my arms, trying to straighten my fingers.

Q. Then did he do anything else?

A. Just working with me that way.

Q. Did he give you any injection of any kind?

A. Well, after they worked with my fingers awhile, Mr. Ladd and two or three others—I don't remember who they were—were rubbing my arms and trying to straighten my fingers, and then the doctor fixed up this dope and put in my arms.

Q. How did he put it in your arms?

A. Through a little needle.

Q. And then you got sleepy?

A. Shortly after that.

Q. Were you suffering very much, Johnnie, during all of that time?

A. Yes, sir.

Q. Were you groaning and hollering?

A. I was groaning pretty loud.

Q. Did you suffer constantly until you came to Portland?

A. Yes, sir.

Q. Did you sleep?

A. Very little.

Q. Then what made you sleep?

A. When I got down to the hospital here, Dr.

Taylor came up about five o'clock, and he gave me something.

Q. To put you to sleep?

A. Well, it didn't put me to sleep right away, but I slept a little that night.

Q. Had you had very much sleep before then since the accident?

A. Not over a half hour, I don't believe, all together.

(Witness excused.)

Dr. FRANK M. TAYLOR, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

#### Direct Examination.

Questions by Mr. RICHARDSON:

Dr. Taylor, what is your business?

A. Physician and surgeon.

Q. How long have you been a physician and surgeon?

A. Since 1901.

Q. Are you acquainted with John L. Bisher, Jr.?

A. Yes, sir.

Q. Did you render any service to him on or about August or the latter part of July last year?

A. I was first called to see him on the 31st of July.

Q. The 31st of July?

A. Yes, sir.

Q. What was his condition at that time, Doctor?

A. Well, I was called up to the Good Samaritan Hospital, and I found him in bed with both hands wrapped up. I immediately proceeded to expose them to find out what the conditions were; and I found the right hand was cramped like this. There was a deep burn right on the inside of this finger and the inside of this thumb, and the burn extending around this way. That was all we could see at the present time, beyond the fact that the hand was considerably swollen, and the temperature sense would indicate there wasn't much of any circulation in it. That was the condition of the right hand, just the visual experience as we would see it. On the left hand there was a burn across the wrist, about this point, as I remember it. I have forgotten whether it was over on the upper side or under side. At any rate, it was across here, and across the back of the hand like this. He had a little laceration of the skin about the elbow on this arm, and also on this arm. His pulse was rapid, and a little bit weak, and he showed considerable signs of what we call shock—in other words, exhaustion. And he was evidently, from all visual experience, in extreme pain.

Q. What treatment did you prescribe and what did you do, Doctor?

A. We first began by using hot lotions on there, with the idea of re-establishing circulation, if possible. In other words, we wanted to save everything we could. There was no way of telling at that time how much destruction there would be. I felt certain

at that time the right finger and thumb of the right hand would have to come off. I also felt sure the skin would have to come off. So we do the next best thing, and we used hot dressings on there, to dilate the arteries as much as possible—bring the blood down there and save as much as we can. We followed that out day by day for about two weeks. At the end of that time the circulation was so completely shut off, and sloughing so bad, the only safe thing to do, and the only way to save the boy's life was to amputate the arm. That was about two weeks, or a little over two weeks after he came in. There was absolutely no circulation left in his hand at that time. There is a peculiar thing about an electrical burn, that there may be more circulation immediately after the burn than some time afterwards, because the tendency of the arteries is to contract. When electricity goes through the system, it goes principally through the arteries, and it inflames the arteries, and as a result of that inflammation those arteries begin to close down and close down — where there is circulation at first there may not be circulation afterwards. At the end of two weeks we went in and made our lines of incision where we could see where the healthy skin was from where the dead skin was. We also held back—took the other tissue as close as we could, between the live and the dead, in saving every particle of arm it was possible. Even we were a little bit afraid we might have to go in again, but we didn't, fortunately. At the same time

we had him under an anaesthetic.

Q. Doctor, maybe you can illustrate it better if you have the young man's arm.

A. I can illustrate it all right on my arm, I think, unless you would rather.

Q. That is all right.

A. At the same time there was a lot of sloughing on this hand, where the burned tissues were gradually coming off. While we had him under the anaesthetic, we cleaned it up as much as we could. At that time I knew part of this bone would come, the bone on the outer side of the arm, I didn't know just how much of it would come out; it hadn't separated itself completely. I still hoped there would be a little on the inside we could save. And after a couple of more weeks, the thing had so completely separated, and we knew exactly where our lines were, we made a second operation. And this bone had completely sloughed off; that is there was a section, a little bit right on this end, that was still alive, and right through here. We simply went through with a gouge, a kind of spoon instrument—we didn't have to take a knife, or saw or anything else—and separated off the dead bone from the live bone. At the same time all of these muscles in here had been completely burned off. If you will have him come up here, I can illustrate that better, Mr. Richardson. (Bisher comes forward.) You see how he is here, this bone here—that is a little of this bone left down here; but this part here was absolutely dead—it was rotten—so we

could take a blunt instrument and separate the live and dead part of the bone. And these muscles here had also sloughed off—there were no muscles. There would be no way of raising these fingers at all; and there would be no way of closing within that much of this one. So we went up here—got these ends of the same muscles above, where they were alive, split them, took this end, turned it over and attached it down here to these tendons. We took two or three of these muscles up that way in hopes of getting some result—some hand there that would be worth something to the boy. Even at that time we were a little bit doubtful whether that hand would be worth anything at all. There was no skin on here. If there had been we could have done a little more radical work at the time; so we had to dress the raw—we had nothing to skin-graft on. Again we took time for nature to do her best. After a couple of weeks more, such a matter—I have forgotten just the exact length of time—we took skin off his leg, and grafted over, which you see here, it is covered over a distance of that kind. So that is what we have. Now, you will see what the result is. You see he can bend his fingers reasonably well, especially these two. There isn't very much strength in this, because the muscles have been bound down. In the first place, there is only one muscle in the whole business, where there ought to be about three to work with. And they are bound down in this scar, so they don't work very well. It is a little tender there at the present time. There

has been a little new bone formed on the edge of where we scraped that off, and he has practically no power of extending these fingers. Now, at the time we did that we were a little bit in doubt. We really thought the conservative course would be to take that finger off. We did like we did every place else—we gave nature a chance to save every piece of tissue we could for the boy, because he needed it—the other arm was gone. So the result is he has these fingers that he can grasp a little. They are better than none at all. Still he hasn't the power of opening it up much. This muscle doesn't work well. It binds down in here.

Q. Doctor, did you do any skin-grafting?

A. Yes.

Q. Where did you get your skin?

A. Took the skin off his leg.

Q. How much did you take off his leg.

A. Took enough to cover this. It left a space on his leg about 4 x 6, or 6 x 6, something like that. When we skin-graft, we don't take the full thickness of the skin. We split the skin, so we take the superficial layer of the skin, and the other heals up. It may leave a little scar where we took it off his leg. Where his hand is particularly weak is this. This bone is gone. He has only one bone where he ought to have two. When he comes to close his hand he comes off at the angle like this. In other words, it hasn't any support on that side. If we had put a brace on there like this, we have got to involve the wrist joint, so

that he cannot work it this way, you see. So that he would be worse off than if he had none at all. Fortunately he is able to grasp, though he is not able to use much strength in it.

Q. What percentage of the efficiency of that hand is lost, Doctor, would you judge, in your opinion?

A. (To Bisher—Just grasp it as tight as you can.) Oh, a conservative estimate would be 75 per cent, anyhow. In the first place, he hasn't the power of grasping anything very tightly. The sense of touch is gone altogether in this little finger. It is nearly all gone in this. There is a little feeling in this. There is one nerve that comes down here, that went through this area here, that sloughed out, that supplies this finger, and supplies the inside of this finger. That nerve is gone. There is no way of picking that nerve up, or of splicing the nerve in there.

Q. Doctor, from your examination and treatment of the injury sustained by the plaintiff, John Bisher, Jr., what would you say as to the pain and suffering accompanying an injury of that kind?

A. Well, the pain is something immense—something awful for a long time. In fact, we had to use drugs for weeks there to relieve the boy. He couldn't sleep—he couldn't rest in the day-time, or anything else, without something. That continued until after the amputation—continued until after we had fixed this up—didn't it, John? We would have to give you something at night? He was a brave chap. Anybody else would have died, I think.

Mr. SMITH: We move to strike that out—about anybody else dying.

A. Well, it did have a lot to do with it.

Mr. SMITH: I move to strike out that part of his lecture as immaterial.

COURT: What somebody else has said about the matter doesn't amount to anything.

A. As a matter of fact, the boy was gritty anyhow, and he stood a lot. He did his best to get along without anything, and he even begged not to have it at times, when I really thought his condition required something to protect his general strength; in other words, to keep him alive. There was one time, just before we amputated, that I really almost despaired of the boy's living, but his constitution and other things were in his favor, and he did pull through, disabled though he is.

Q. Now, Doctor, did you examine his ears? Did you know that his head was injured?

Mr. SMITH: His ears? His hearing?

A. I don't remember of having noted it.

Q. Not his hearing; but they never called your attention to any trouble that he had with his ears?

A. If they did, I have forgotten it. I don't remember.

#### Cross Examination.

Questions by Mr. SMITH:

How long did you treat him?

A. I treated him from July 31st to about the mid-

dle of October, I think it was he went home.

Q. From the wound that you found, or the condition that you found in his left arm, what did you think caused that injury?

A. From coming in contact with the wire.

Q. And how far up the arm did it extend?

A. Well, just the point of contact apparently was about here. Here was the point of the greatest burn, just above the wrist joint. In other words, about the center of the area of the destruction there. We would naturally assume that is where the contact was, because that is where the greatest burn was; and it was from that, radiated around, that destruction went on.

Q. Did that extend up the arm or not?

A. Well, not far up the arm.

Q. How far up the arm?

A. Just over the area where the skin sloughed off there.

Q. How big an area did the skin slough off?

A. It is about five inches—4½ to five inches.

Q. That is the extent that you think touched the wires?

A. No, that extent didn't touch the wire. That is, I don't suppose that extent touched the wire. I don't know.

Q. You don't know?

A. No.

Q. You don't know enough about electrical burns to know how much of that extent would necessarily touch the wire to get that sloughing off area, do you?

A. Not necessarily more than—

Q. Will you kindly answer the question?

A. That question cannot be answered that I know of.

Q. That is what I want to know. You don't know enough about electrical burns to know how to answer that question, do you?

A. No.

Redirect Examination.

Q. Doctor, you couldn't tell from the examination of the boy, the plaintiff, the extent of his burns, or how he received the burns, could you?

A. No.

Q. All that you can testify to is what you observed when you were called in?

Mr. SMITH: I think that is a matter for the court and the jury also.

COURT: The jury understands the question.  
(Excused.)

JOHN BISHER, Jr., recalled for the plaintiff.

Mr. RICHARDSON: I desire at this time, your Honor, to offer this in evidence, and mark it as "Plaintiff's Exhibit 1." It is admitted by the defendant.

Mr. SMITH: We will agree that it may be marked as a mutual exhibit.

Mr. RICHARDSON: Yes. Let the record show that the cross-arm and four pins shall be introduced in evidence as the mutual exhibit of both plaintiff and

defendant.

Marked "Exhibit B-1."

(Excused.)

ALBERT SMITH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. RICHARDSON:

What is your full name?

A. Albert Smith.

Q. Where do you reside?

A. Halfway.

Q. Halfway, Oregon?

A. Halfway, Oregon.

Q. Where were you residing on or about the 28th of last July?

A. Well, sir, I was working at the Union-Companion mine.

Q. You were working where?

A. At the Union-Companion mine.

Q. Union-Companion?

A. Yes, sir. That is the Cornucopia Mining Company.

Q. Whom were you working for on about the 28th of last July?

A. Well, sir, I supposed I was working for Mr. Betts.

Q. You were working for Mr. Betts?

A. Yes, sir.

Q. What kind of work were you doing on or about the 28th day of last July?

A. Well, I was sifting rock. Sifting rock out for the concrete.

Q. Sifting rock?

A. Yes, sir.

Q. Did you know Johnnie Bisher at that time?

A. Yes, sir.

Q. Where was Johnnie Bisher working at that time?

A. He was doing just odd jobs around there. I don't remember just what he was doing at the time.

Q. Did you hear any one give Johnnie Bisher any orders?

A. Yes, sir.

Q. On that day?

A. I heard Mr. Ed Mills tell Johnnie Bisher that What's his name?

Q. Buxton?

A. Mr. Buxton—to go down, that he wanted him on the line.

Mr. SMITH: How was that, now? State that again.

Q. Just repeat that loud enough so we can hear it.

A. Mr. Mills, Ed. Mills—

Q. Who was Ed. Mills?

A. Well, he was the man that I was working under—the boss.

Q. Working under?

A. Yes, he was the boss. He was the boss at that

time, that I was working under.

Q. What did he say?

A. He told Johnnie Bisher that Mr. Buxton wanted him down on the line.

Q. On what line?

A. On the electric line.

Q. Who was Mr. Buxton?

A. Well, he was the man at the powerhouse. I don't know him—don't know the man at all.

MR. SMITH: We move to strike out the evidence as incompetent, irrelevant and immaterial.

COURT: I will overrule the motion.

Exception allowed.

(Excused.)

L. W. SLOPER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. RICHARDSON:

Mr. Sloper, what is your business?

A. Electric lineman.

Q. How long have you been working as electric lineman?

A. About eleven years.

Q. Are you familiar with the handling of live wires carrying a voltage of as high as 2300 volts of electricity?

A. Yes, sir.

Q. Have you, during your years of experience, handled live wires?

A. Yes, sir.

Q. Of that voltage?

A. Yes, sir.

Q. And higher voltage?

A. No, never handled any higher than that.

Q. Never handled anything higher than 2300?

Mr. Sloper, you heard the testimony of the plaintiff and the plaintiff's witnesses in this case, haven't you?

A. Yes, sir.

Q. I will ask you, Mr. Sloper, if a three-phase transmission line, such as has been described by the witnesses in this case that you have heard, consisting of copper wires a little larger than a lead pencil, strung upon poles about 25 feet from the ground and on a support known as a cross-arm, such as the one in evidence here, said transmission lines being the distance as you observe between these two insulators on this Exhibit "B-1" of both plaintiff and defendant, the cross-arm being nailed to a post about eight inches in diameter, and the third wire being placed on an insulator on this end of the cross-arm, would it be, in your opinion, safe for a repair man or any one else to make repairs, or to change these insulators, on uninsulated wires carrying a voltage of electricity as high as 2300 volts? State whether or not, in your opinion, a workman or repair man, without the use of rubber gloves, without the use of insulated handles on pliers, or any other lineman protectors, could make those changes without endangering themselves to great injury and shock by electricity?

Mr. SMITH: Objected to as invading the province of the jury, and as incompetent.

COURT: You might qualify him as an expert.

Mr. RICHARDSON: He is qualifying as an expert lineman.

COURT: Very well. I will overrule the objection. Exception allowed.

A. I should consider it very dangerous.

Q. Explain to the jury why you would consider it dangerous.

A. Well, the lineman's pliers are nine inches long, in the first place, and when he unwraps the wire off the insulator, he does it with his pliers, especially if he has on rubber gloves, which we always have in handling that kind of voltage, and unwrapping that, the pliers nine inches long, and the wire unwraps three inches, as he is unwrapping it around he is liable to hit his hand on the other side, in the first place.

Q. What are the customary tools and appliances that an electric lineman in working upon a power line that I have described, in which the wires are un-insulated, what are the customary tools and appliances that a lineman will use?

A. He first has his pliers insulated, and the company always furnishes rubber gloves, and in a job like that he should have what they call a sow-belly. It is about four feet long, made of heavy rubber, tested to 60,000 volts. The first thing he does is to put that sow-belly on the middle wire. Then he can lean over and work on the outside wire with safety, and change

that insulator; and then take his sow-belly off and change the inside one, and then turn around and change the other one.

Q. Now, Mr. Sloper, is it practical to insulate wires carrying a voltage of 2300 volts?

A. Yes, sir, they are always insulated. The pole and the wire being dry, if they had been insulated here there would have been no danger of any accident.

Q. If the wires had been insulated in this case, there would not have been any accident?

A. No.

Q. If it had been a good insulation?

A. Yes.

Q. Would insulating the wire have any tendency to decrease the efficiency of the plant?

A. No, sir.

#### Cross-Examination.

#### Questions by Mr. SMITH:

What kind of insulation have you ever seen on a cross-country wire of 2300 volts, up in the mountains?

A. The regular insulation that they put on wire of that voltage.

Q. What is it made of?

A. It is made of cotton and tar solution made up.

Q. What you call weather insulation, isn't it?

A. What we call weatherproof, yes.

Q. That is all there is to it? It is weatherproof,

isn't it?

A. It is called insulation.

Q. It simply protects the wire from inclemency of the weather, isn't that it?

A. And from the handling of it.

Q. And it is no protection whatever against handling a live wire, is it?

A. It certainly is, yes, sir.

Q. What protection?

A. If it is dry, it is absolutely safe.

Q. Do you mean to swear as an expert that you can insulate wire carrying 2300 volts with weather insulation?

A. Yes, sir.

Q. Do you know of a single wire in the United States where it is done so as to be a protection against shock?

A. I know of where it is always done.

Q. Where?

A. In Portland and other places.

Q. What do the high tension wires that come into this city carry?

A. Ten, fifteen, twenty, and sixty thousand.

Q. Clear up to 60,000. Do you know of a single 60,000 wire across country, that is carrying 60,000 voltage, that is weather insulated?

A. They don't handle anything as high as that.

Q. Will you answer the question? Do you know of a single transmission wire carrying 60,000 volts, that is insulated with weather insulation, coming into

this city?

A. They don't insulate high voltage wires.

Q. The higher the voltage the better it is to leave the insulation off, isn't it?

A. Well, that high it wouldn't do any good; it would burn off. It is too hot.

Q. Isn't it the fact the higher the voltage the more they leave off the insulation?

A. When you get above 2300, it is, yes.

Q. Why does 2300 happen to be your limit?

A. That is as high as they generally insulate.

Q. With this weather insulation?

A. With any kind of insulation that I know of.

Q. Did you ever know of a man being shocked by coming in contact with insulated wire, 2300 volts, when they only had weather insulation?

A. When it is wet, yes.

Q. When it is dry? Do you know what lightning arresters are?

A. Yes.

Q. Where are they put?

A. Put on poles—

Q. Where else?

A. To substation.

Q. On the inside, under the roof, aren't they?

A. Some of them are.

Q. Insulated?

A. No.

Q. With weather insulation?

A. No.

Q. Would you use weather insulation on a lightning arrester in a power house?

A. There would not be any need of having it there.

Q. Why?

A. You don't have to come in contact with that.

Q. But do you mean to testify that that light weather insulation of cotton and a little tar there, is to protect men that come in contact with the wires?

A. I don't know what else it is put on wire for, if it ain't for that.

Q. How long have you been in the electrical business?

A. About eleven years.

Q. What have you been doing?

A. Lineman.

Q. What school are you a graduate of?

A. I didn't graduate from any school.

Q. No, I thought not. Did you ever do anything else except work as a lineman?

A. Yes, sir.

Q. What?

A. I worked on a farm.

Q. From the farm you went to this electrical work?

A. Yes, sir.

Q. That is all you know about it, is it?

A. That is all I know about it, is the general work as a lineman, that is all.

Q. Now, I wish you would tell us, please, how those nippers or pinchers, or whatever they call them

—what is it they call them there, they are working with on the pole?

A. Pliers.

Q. How are they protected so you won't get a shock from them?

A. There's first three wraps of rubber on the plier, and then the outside has cotton covered over it to protect the rubber from wearing out.

Q. Suppose at the time a man is hurt he is not using his pliers, and he couldn't use his pliers on the work he is doing, the fact that the pliers are wrapped wouldn't save him, would it?

A. No.

Q. Where have you worked as lineman?

A. Well, I have worked in San Diego, and Los Angeles, and Portland—Walla Walla.

Q. Where are you working now?

A. I am not employed at the present time.

Q. How long since you have had employment?

A. A couple of months.

Q. Where did you work as lineman when you quit?

A. Bellingham, Washington.

Q. For what company?

A. Bellingham and Snoqualmie—Stone & Webster.

Q. Did you work as lineman on electric transmission line, or telephone line?

A. Transmission line.

Q. How long did you work there?

A. About two weeks.

Q. Do you know how long the average cross-arm is, as it stands on the pole out in the country carrying three wires—three phase system?

A. They are different lengths.

Q. Here is an arm that is four feet in length. State to the jury whether that is a safe length of a cross-arm for four pegs on it, with three wires?

A. Well, I would consider it very close.

Q. What do you mean by very close?

A. Between the wires.

Q. Between which wires?

A. Between all of them to be safe to work between.

Q. If it measures thirty inches from the post No. 3 to the end post on either side, with only three wires, leaving a thirty-inch center, you call that a very close place to work?

A. Thirty inches is the regular space to work between.

Q. Then it is not close, is it?

A. Those two wires isn't close. But the outside one is the one I have reference to.

Q. Suppose on this cross-arm as it is before you, we should take the left hand end of it—there is a wire at the outer peg, and the next peg on the inside is 12-inch center, and suppose that a lineman should just lift that wire over that pole and leave it over the third peg, he would still have the thirty inches there, wouldn't he?

A. Yes, sir.

Q. He wouldn't be crowded for space, would he?

A. No.

Q. Be plenty of room, wouldn't there?

A. Yes, ought to be.

Q. Be perfectly safe, wouldn't it?

A. Yes.

Q. So there could be no complaint made as to lack of space, could there?

A. There is thirty inches. That is the rule.

Q. You have worked in places where they carry 60,000 volts, with less than thirty inches to work between?

A. I never worked between that voltage in my life, and never shall.

Q. What is the highest voltage you ever went between?

A. 2300 is the highest I ever handled.

Q. Don't you know men handle 60,000 volts without fear of danger under those circumstances?

A. I don't know that.

Q. Do you know Charley Wolfington, of Lewiston, Idaho?

A. No, sir.

Q. Do you know any of the electricians of this city?

A. Yes, sir.

Q. Any of the men in charge of affairs?

A. Yes, sir.

Q. What is the highest voltage you know they

can handle when they are handling it alone?

A. 2300 is the highest they handle, take any man with any sense. When he handles any more than that he is taking great risks of life.

Q. Why?

A. Well, because you cannot tell what it is going to do.

Q. What is the smallest voltage that will kill?

A. Well, I have known 500 volts to kill.

Q. Have you ever known less than 500 to kill?

A. I know a man that got his hand burned, that is, all crimped up, on 220.

Q. How many wires did he touch to get that?

A. He just got a ground on it.

Q. And that is the same as two wires, isn't it? That is, if it were wet or damp, or he was standing on the damp ground somewhere, he would?

A. Yes.

Q. It is impossible for a man to get a shock from one wire unless he got a circuit from somewhere else?

A. If it is well insulated; but if he is on a pole, and the pole is wet, these sharp hooks, when it sticks into the pole where it is damp, it would give him a shock.

Q. That is the other contact?

A. Yes, sir.

Q. That is the same as if on the ground, isn't it?

A. Yes, sir.

Q. You take a dry pole, in the latter part of July, on a cross-arm like you see this is, a man on the pole

away from the ground 25 feet, it would be perfectly safe to touch one of those 2300 volts with one hand, wouldn't it?

A. No, sir.

Q. Suppose they have done it without injury, would that be any proof to you?

A. He might do it for a month and then he might get hurt.

Q. Because of his carelessness?

A. He couldn't help it. I have got shocked in very dry weather, when I have been handling it for a long time. Then I would take hold of it, and it knocked me pretty near off the pole.

Q. You would handle it safely 99 out of a hundred?

A. I had handled it, but it was dangerous to do it.

Q. Handle it safely 999 times out of a thousand, wouldn't you?

A. No, sir, not that big a percentage.

Q. How do you account for the shock when things are in perfect condition, with a dry pole, dry cross-arm, in the middle of summer?

A. You cannot tell when the pole is always dry. It is liable to be wet. You think it is dry, and it ain't.

Q. It is because the pole was wet and you didn't know it you got shocked?

A. Yes, sir.

Q. Then you didn't answer the question, whether or not it wasn't safe to handle it with a dry pole?

A. If the pole is absolutely dry, and you know it

is dry, and you cannot tell.

Q. Suppose it is dry and you don't know it?

A. If it is dry, you are all right.

Q. Do you know what these service wires in Portland carry out in the suburbs?

A. I know what some of them carry.

Q. How much?

A. Well, 2300 volts is what they carry out to distribute over the city.

Q. You mean that wires that carry over 2300 volts—let us see if we cannot get away from that—wires that come from that transmission wire, come into the houses, that service wire—what does it carry?

A. Some carry 11,000.

Q. That come into private residences?

A. Oh, 110 and 220.

Q. 110 and 220. That is the way they measure it in the city, isn't it?

A. Yes, sir.

Q. That is the standard under which this city is limited—three phase system, at 110 and 220?

A. Yes, sir.

Q. Those wires are weather insulated, aren't they?

A. Yes, sir.

Q. Did you ever know anybody to get shocked with that light weather insulation?

A. Yes, I have on 220.

Q. So weather insulation doesn't protect against a shock, does it?

A. Not with the insulation, I never knew them to get shocked—I didn't, no; not through the insulation they didn't.

Q. You say the company has always furnished rubber gloves?

A. Yes.

Q. How big gloves?

A. How big?

Q. Yes; how far up do they come?

A. They have long cuffs on them. Come up about there, I think.

Q. Gauntlet gloves?

A. Yes. Here is a pair of them.

Q. What effect do they have on your hand when you work?

A. Well, they are clumsy to handle.

Q. Hands sweat, do they?

A. On a very hot day they do a little.

Q. What company furnishes those gloves, do you know?

A. All of them do.

Q. Do they furnish them to boys that are required to work on the ground and carry material from pole to pole?

A. If they have got any wires to handle, they do.

Q. Well, will you answer the question? If they carry materials from pole to pole, do they furnish them for that?

A. No, not to carry material with.

Q. How large a voltage can you handle with rub-

ber gloves safely?

A. Well, it is about 2300, is the highest we ever do handle.

Q. You never tried it above that, did you?

A. Never will either. I think too much of my life for that.

Q. Although there is only one wire and the pole dry?

A. No, sir.

Q. What is the highest voltage of a man receiving and living?

A. High voltage, the higher you get, it is like taking strychnine. 2300 is about the right amount to kill a man. If you get over that, it has the effect like strychnine does. It burns worse than it kills. 2300 is about what generally kills a lineman—about nine-tenths of them.

Q. Answer the question, please. What is the highest voltage you know of a man receiving and living?

A. I have known a man to get hit with 60,000, and live; both hands burned off, and live.

Q. Now, can you conceive, or do you know of any duty that a lineman has to perform anywhere that requires him to touch two of these live wires at the same time?

A. That is something we try to keep from doing.

Q. Well, now, will you kindly answer that question? Is there any possible duty that he could be performing that would require him to touch two wires

at the same time?

A. Not that I ever heard of, no.

Q. If he would, his work would be pure carelessness, wouldn't it?

A. Well, we all make mistakes, you know.

Q. Kindly answer the question. Wouldn't it, in your judgment?

A. Well, I don't consider it that way, no. I know too many get it to do it.

Q. Now, we will take your weather insulation again. How long does that weather insulation last?

A. Well, it generally lasts three or four years in good shape.

#### Redirect Examination.

Q. Now, Mr. Sloper, if the transmission lines that are spoken of here, and poles on this support as described by the witnesses—if those lines had been insulated, in your opinion, would there have been any accident?

A. No, I don't think there would.

Q. Isn't it highly probable—not only possible, but highly probable, and oftentimes, that a man short-circuits by taking hold of a live wire when he is simply touching nothing, except his feet are holding onto the post, with his climbers stuck into the post?

Mr. SMITH: Objected to. This man is an expert. That is not the fact in this case at all. It is admitted that the boy touched the other wire. He has admitted that himself.

Mr. RICHARDSON: No, your Honor, I beg your pardon—I have not heard of any one admitting it. There has no one particularly denied it. The boy says he doesn't know. There is no evidence to show whether he touched the other wire. My theory is that he shorted in, he threw both hands up, and he came in contact with both wires, it is a cinch. But what I mean is, he could have gotten a shock by short-circuiting with the post and holding one wire. That is probable. My theory is that the plaintiff received his injuries by striking two wires. That is the impression. But the question I am asking is to show that it is probable, from this expert witness, that he could get a shock from that matter.

COURT: I think that is outside of this inquiry if that is your theory about the question.

Q. Now, what would be the proper distance—what is the distance in this city, and custom, between electric wires carrying a voltage of 2300 volts?

A. They are fifteen inches apart.

Q. Fifteen inches apart. And are they insulated?

A. Yes, sir.

Q. Have you worked upon the lines of the Portland Railway, Light & Power Company?

A. I have, yes, sir.

Q. And all of their lines carrying 2300 volts are insulated?

A. Yes, sir.

COURT: That is a rather leading question.

Mr. RICHARDSON: Yes, that is right. I beg your pardon there.

Recross Examination.

Q. There is one thing I forgot to ask him about—the use of this body protector. This body protector that you commonly call—I guess the boys do on the wires, call it sow-belly, don't they—that instrumentality?

A. Yes, that is what some of them call them, yes.

Q. Suppose a case like this, Mr. Sloper: That here is this cross-arm four feet long. Here is the outside wire in place, wired down to this insulator; a similar one on the other end; and they are working on the middle wire—how would they use that thing then?

A. Lay that over the middle wire, and take the outside one off and put on the other insulator, put it up, tie it in, and take the sow-belly off.

Q. No, the outside wires are already fixed, and they are working at the middle wire?

A. They wouldn't need the sow-belly then.

Q. Exactly. That is all.

(Excused.)

L. H. KENNEDY, a witness called on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows.

Direct Examination.

Questions by Mr. RICHARDSON

What is your business, Mr. Kennedy?

A. I am an electrical worker.

Q. How long have you been engaged in that work?

A. Seven years.

Q. How many years of experience have you had as a lineman?

A. Four years.

Q. Four years.

A. Four years and a half.

Q. Have you worked in this city?

A. Not as a lineman, only a short time.

Q. Are you familiar with the work of a lineman?

A. I am.

Q. What are considered by electrical linemen as being essential tools and appliances to work with?

Mr. SMITH: Objected to unless you limit it to this case. I have no objection to his showing the facts of the case, or putting in his case.

Q. I will refer to that. Taking into consideration, Mr. Kennedy, you have heard the evidence in this case?

A. I have.

Q. And you have heard the description of this electric power plant or transmission line, carrying a voltage of electricity from the power plant to the stamp mill of the Cornucopia Mines, haven't you?

A. I have.

Q. Now, for repair men to make repairs on a line of that kind, what would be considered by practical and experienced linemen as being the proper tools and appliances to work with, to make repairs and change insulators?

A. Well, I would consider the sow-belly and a pair

of rubber gloves the most essential; also insulated pliers; but then I would insist on the sow-belly and a pair of rubber gloves, or I would not work on it.

Q. What about the distance. Would twelve inches be a sufficient distance, or the distance from this insulator to this one, supporting live wires, carrying 2300 volts of electricity, and the naked wire uninsulated, would that be, in your opinion, considered a safe distance for an electric lineman to make changes of insulators, to work among?

A. I would consider that a very dangerous distance to work on.

Q. Is it practical to insulate an electric wire carrying 2300 volts?

A. It is.

Q. Have you with you any pieces of insulation of copper wires?

A. I have.

Q. What do you call that, Mr. Kennedy? (Referring to piece produced).

A. That is weather proof, triple braid, No. 1, copper solid.

Q. Is that used in the City of Portland on all transmission lines carrying 2300 volts?

A. Well, that is used, the same thing—

Mr. SMITH: Now, will you kindly answer that question, please.

A. Weather proof wire is used in Portland, triple braid.

Q. And you call this a triple braid, weather proof

wire?

A. I do.

Q. In your opinion, if these transmission wires that have been described by the witnesses in the trial of this case would have been insulated according to this insulation, would there have been any injury?

A. There could not have been.

Q. Do you know any other known and used insulation that, if it had been used and had been in good repair on the same transmission system, would there have been any injury?

A. Nothing that is practically different, materially different; different insulation, but materially the same for outside work.

Q. What is the custom of the average employer of requiring linemen to use rubber gloves?

Mr. SMITH: Objected to, as the custom is not pleaded in this case, or relied on. He cannot rely upon the statute and custom at the same time. If he wants to amend his complaint and rely on custom, he can do so.

Mr. RICHARDSON: It is not a question of relying on custom, if they failed to use the safety device, any safety device, for the purpose of protecting their employes.

COURT I will overrule the objection. You may proceed.

Question read.

A. In the last three years, they have all forced me to take rubber gloves or not work.

Mr. SMITH: We move to strike that out, if the Court please. That is no answer to the question that was asked.

A. Shall I answer it again?

COURT: I think that ought to go out. I do not think that is an answer to the question.

Q. What is the custom? Answer it as to the custom in your actual experience.

A. What is the question?

(Question read.)

A. It is the custom to require them to use rubber gloves, to accept rubber gloves. It is their option as to using them.

Q. Even in working on transmission lines that are insulated?

A. Yes, sir.

Q. Do you know, are you familiar with the transmission lines of the City of Portland carrying 2300 volts of electricity?

A. Well, not, no, sir.

Cross-Examination.

Questions by Mr. SMITH:

How long have you worked in the City of Portland?

A. Three years—two and a half years.

Q. Where do you work?

A. I have worked at inside insulation of electrical apparatus, the last two and a half years.

Q. That was where you got this, wasn't it?

A. No, sir.

Q. Where did you get it?

A. Outside.

Q. Outside of what?

A. Outside work.

Q. Outside work?

A. Here on the Portland Railway, Light & Power Company.

Q. What I am asking you is, where did you get this?

A. I got that from the supply house.

Q. You did not take it as a part of the thing you saw in use, did you?

A. No, sir.

Q. And you know that that is used on the inside of the power house, where men are exposed to the machines right along, don't you?

A. That is used on the outside.

Q. Answer the question. Isn't this the inside insulation that they use right around the generating machinery all the time, and around the transformers?

A. I think not.

Q. Do you know?

A. Not that I know of.

Q. Do you know of a single transmission line in this country where they use that on a cross country line?

A. I don't know about cross country lines.

(Witness excused.)

L. W. SLOPER, recalled for the plaintiff.

Direct Examination.

Questions by Mr. RICHARDSON:

Mr. Sloper, you have testified you are familiar with insulation. What kind of insulation is that? (Showing witness the piece produced by Mr. Kennedy).

A. Weather proof—used for outside work.

Q. Weather proof, used for outside work?

A. Yes, sir.

Q. Is that the class and kind of insulation that is used by the Portland Railway Light & Power Company in this city?

A. Yes, sir, that is the same thing.

Q. On the outside work?

A. Never used inside at all.

Q. That is never used inside?

A. That is weather proof. It is used for outside work. If it had been used for inside work, it would be what is called rubber covered. This is weather proof. This is used for outside absolutely.

Q. Mr. Sloper, is that the kind of insulation that they use on transmission lines that carry a voltage as high as 2300 volts?

A. Yes, sir. That is the same thing they use on 2300 volts.

Q. Now, I will ask you, in your opinion, if the copper wires in the case we have under consideration, if the transmission wires to the Cornucopia Mines, that were carrying a voltage from the power plant to the stamp mill—if that naked wire had been insulated

according to that insulation, similar to that, would, in your opinion, there have been any accident happened to the boy who was changing these insulators?

A. I think he would have been absolutely safe.

Cross-Examination.

Questions by Mr. SMITH:

You say that is used in Portland?

A. Yes, sir.

Q. Whereabouts?

A. All over the city, wherever they run 2300 volts.

Q. Is it used down here in the business section of the city?

A. No, it is not used down here. They don't have any outside wires in the main part of the city.

Q. They have underground wires in the city, don't they, down here?

A. Yes, sir.

Q. You say they use that insulation over through the rest of the city?

A. Over where it is distributed on poles.

Q. Do you know where a cross country wire is that uses that insulation?

A. Yes, sir, I do.

Q. Where?

A. Walla Walla.

Q. Over the country?

A. Running down from the plant, down Mill Creek, from the Mill Creek Station down into Walla Walla.

Q. The same type and grade?

A. The same type and grade. I would not say it was there now. It was there, though.

Q. How long ago?

A. About three or four years ago.

Q. Well, now, don't you know that the modern way of handling those transmission high tension wires is to leave them uninsulated, cross country wires?

A. What we call high tension wires is high voltage wires. 2300 volts always—2300 always is insulated.

Q. Always insulated?

A. Yes, sir.

Q. Do you know where the line is from here to Salem?

A. No.

Q. Salem, Oregon. Do you know where the line is around the vicinity of Pasco and Kennewick in Washington?

A. No, sir.

Q. Do you know where the line is from Yakima down to Prosser?

A. No, sir.

Q. Do you know the wires in Spokane, Washington?

A. Yes, sir.

Q. Are they insulated that way?

A. They didn't used to be when I was there.

Q. When was that?

A. It has been about eight years ago.

Q. Were you working at the business then?

A. Yes, sir.

Q. And you say they didn't insulate them that way then, did they?

A. No, sir.

Q. And you say this Walla Walla one was four years ago when you recall that?

A. Yes, sir.

Q. Do you know a transmission line that runs to Lewiston, Idaho, and Genesee, and around there? Do you know the Pomeroy plant?

A. No, sir.

Q. Do you know the plant at Baker City in this State?

A. No, sir.

Q. Do you know the plant of any small towns in this State, ranging from 5,000 to 15,000 inhabitants, or any of the surrounding country? Do you know what kind they use at Medford?

A. No, sir; I have been in California the last three years.

Q. What part?

A. Los Angeles.

Q. Underground wires?

A. In the main part of town, yes.

Q. You don't know whether in the cross country transmission wires in this state—you can't name one where they use that kind of insulation, can you?

A. I don't know of any 2300 volt transmission

lines now today.

Q. Do you know of any 229 line that uses it?

A. No, sir, I don't.

Q. Do you know of any 301 that uses it?

A. I don't know anything under 10,000.

Q. How long would that weather insulation last?

A. Three or four years—five.

Q. Now, you say that you know that that is plain weather insulation from the fact there is no rubber surrounding the wire?

A. That is called weather proof.

Q. Didn't you testify you knew that from the fact there was no rubber surrounding the wire?

A. Yes, sir, I did.

Q. If there were rubber there, it would be a better protection against electricity than it is, wouldn't it?

A. Supposed to be, yes.

Q. If that weather insulation you talk so much about happened to be a little old, it would be a deception and a snare? It wouldn't be any protection at all, would it?

A. It would be some protection. Your coat sleeve is some protection.

Q. It would be about as much protection as your coat sleeve, too, wouldn't it?

A. If a man happened to hit his hand with that, and didn't get against the wire, it would protect him.

Q. If he didn't strike the wire, he wouldn't get shocked at all, would he?

A. If the insulation was very wet, he would get shocked if he just touched the insulation.

Q. From your experience as a lineman, I will ask you whether it is too much work for one man to try to lift one of these wires from one peg to the other?

A. Well, it is according if the pole is on a hill, and there is a strain on the wire, it is a heavy lift to lift it over the top of the pole.

Q. You know that one man does it right along, doesn't he?

A. Yes, sir, one man is supposed to do it.

Q. And it is one man's work, isn't it?

A. Well, yes, it is one man's work, unless it is too heavy for one man.

Q. How is that?

A. Unless it is too heavy for one man. If it is on the hill, one man couldn't lift it over.

Q. What difference does the hill make, if he is working up on the pole?

A. The wires is drawn tight, and he cannot raise it up.

Q. Raise it over the hill, or over the pole?

A. Over the arm of the pole. If it has a tight tension on, he couldn't raise it over.

Q. Wires in the country are usually not drawn tight? They are loose and sag?

A. Some of them are drawn tight, heavy wire like that.

Q. Don't you know, in using those wires they have to allow them to sag, because of storms that hit the

pole in the wind, it makes it necessary?

A. No, I don't.

Q. You do not?

A. No.

Redirect Examination.

Q. Isn't it the fact if they are slack—isn't that one of the reasons why they should be insulated, so they don't get together?

A. Yes, that would protect them from striking together, protect the arm.

Q. What is the object of insulation?

A. Why, it is to protect the lines, and if they happen to fall on the ground, from people getting against them, or working amongst them, and every other way.

Q. Or in case of a storm?

A. Yes. In case of a storm, if they happen to strike together, it protects them from burning down. I have seen them wrapped together. They would go right on and work that way.

(Witness excused.)

Mr. SMITH: Do I understand that counsel is not going to offer that wire in evidence? I will ask him at this time.

Mr. RICHARDSON: If the defendants are not going to offer it, I will. I have no objections to having it offered.

COURT: It is supposed to be in evidence.

Mr. RICHARDSON: It is already in evidence, so

far as I know.

COURT: Very well.

Marked "Plaintiff's Exhibit 2."

Mrs. JOHN BISHER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

### Direct Examination.

Questions by Mr. RICHARDSON:

Mrs. Bisher, are you the mother of John L. Bisher, the plaintiff in this case?

A. Yes, sir.

Q. About what time of the day was it that Johnnie was brought to your home, injured, Mrs. Bisher?

A. Somewhere near two o'clock, Sunday afternoon, July 28th.

Q. What was his condition when brought to the house, Mrs. Bisher?

A. He seemed to be out of his head. He would wander. He knew me when he first came up, and they lifted him out of the automobile, and they started with him to the house. But he was flighty at times, —would know me just for a little bit, and then he would tell me not to twist his arms; that I was twisting them. And I had help there, and he kept telling me that we was twisting him when we wouldn't be touching him at all. And his color was very dark. It was purple—looked kind of purplish black, his face was.

Q. Was he suffering any, Mrs. Bisher?

A. He seemed to be in terrible agony at times, and then at other times, he would seem easy for a second, and then he would be in misery again.

Q. Did he groan, or give any evidence of enduring and suffering great pain?

A. Yes, sir, he did. And he would try to get up, and moan, and sometimes scream until they could hear him outdoors.

Q. Did you have a doctor with him at that time?

A. I had a doctor. The doctor met him as the automobile came up with him.

Q. How old is Johnnie, Mrs. Bisher?

A. 18 years old last May.

Q. Do you know what wages Johnnie was earning at the time he was injured, Mrs. Bisher?

A. I do not.

Q. You do not?

A. No, sir. He told me he was earning \$3.00 a day, and he sent me a check once to deposit in the bank of \$70.00, and he said that was his month's wages to deposit in the bank.

Mr. SMITH: We concede he was earning \$3.00 a day.

Q. What was his physical condition just prior to his injury, as to his general health, Mrs. Bisher?

A. He was very healthy, and very strong; had never been sick since he was a little boy, except when he had the smallpox in Baxer City.

Q. Had he ever had any experience in working with electric lines, and high voltage wires?

A. Not as I know of.

Q. You would have known it, if he had, wouldn't you?

A. Yes, sir, I think I would. I always tried to caution him to keep away from danger.

Q. Did you know that he was working on this line?

A. No, sir, I did not.

Cross-Examination.

Questions by Mr. SMITH:

You knew that Johnnie was very much interested in electricity, didn't you?

A. He never has said anything to me about electricity in any shape or form.

Q. He never told you what he wanted to do when he got big?

A. No, sir, he never did.

Q. Never spoke about being an electrician?

A. No, sir, he never did.

Q. Did you know that since he has been hurt, he has been studying this?

A. I did not.

Q. Not until today?

A. All he asked us was that he wanted a good education, to go as high as he could in educational matters. He was very ambitious to get a high education.

Q. He never told you along what line?

A. He never said anything. He took the com-

mercial course at the High School. Professor Churchill told me what course he took. He took the commercial course at the High School.

Q. He lived at home while he worked for Mr. Betts?

A. He did not. He came from school, he was home one week, and he went to the mines. He has been at school most of the time in Baker City, going to High School. Prior to that he graduated from the Grammar School at Whittier, near Los Angeles, California.

Q. How far was he working from home at the time he was hurt?

A. It must be about—I don't know the exact distance, but it must be thirteen—somewhere between twelve and fourteen miles to Cornucopia. I don't know just exactly the distance up there.

Q. Was he boarding over where he was working, or living at Cornucopia?

A. I didn't know where he was boarding, but since then they have told me he was boarding with Mrs. Snyder in Cornucopia when he got hurt; but I supposed that he was at the mine yet. I didn't know he was at Cornucopia at all.

Q. All you know is what they have told you, or what you had supposed about that?

A. About his being at Cornucopia—I didn't know he was there. I supposed he was at the mines, still working around outside.

Q. Now, what time do you say they brought him

home?

A. It was about two o'clock, or a little after, somewhere in the neighborhood of two. Dr. Walsh phoned to me, and I looked at the clock, and it was just half past one, Sunday afternoon, July 28th.

Q. Now, when he came home, did he seem to be reviving or sinking?

A. Well, he didn't seem to know much of anything. He was like one dazed, and he seemed to be wandering in his mind. I couldn't seem to get much of anything out of him. He seemed to be like he didn't know what he was doing, nor nothing.

Q. Did he know you?

A. He knew me when he first came up, but he didn't seem to know me a little while afterwards, and then when I came in again, he would seem to know me.

Q. Just sort of momentary memory?

A. Yes, just seemed to be.

Q. You know that he is still pursuing his studies, don't you?

A. He is going to High School. He expects to graduate this spring. I suppose he is finishing in the Commercial Course.

Q. He has always done good work in school, hasn't he?

A. As far as I know he has. Professor Churchill told me that it was pretty hard for him now, though, because he was so very nervous.

Q. Now, you operate, or your people operate a

telephone line in that country?

A. Yes, sir.

Q. How long have you operated that?

A. Well, we have been operating a telephone nearly ever since we have been there for the last about nine or ten years.

Q. And who has done the work on the line?

A. Mr. Bisher, or he has hired a man. When he didn't do it himself, he hired somebody.

Q. Do you know whether Johnnie ever worked on the poles?

A. Yes, Johnnie helped sometimes, when we couldn't get men, and his father would be gone, or his father would want help, and he would go out with another man, and put up telephone line, if a pole had fallen down, or repair it if it broke, or something like that.

Q. You knew that he was acquainted with how to work on a pole?

A. Why to a certain extent, but not to any great extent, because we never left him alone on it. We always had somebody with him.

Q. How many years had he worked on telephone poles for you?

A. Oh, once in awhile, he would help for the last four or five years. Every once in a while, he would go up a pole—just now and then when something was in trouble. He first climbed a pole without any climbers. We would not allow him to have climbers for fear he would fall with them.

Q. Afterwards he got so he could use climbers all right, didn't he?

A. I don't know. I never saw him up on a pole in my life.

Q. He was your trouble boy on the telephone line?

A. Not always. We never allowed him to go alone, because fixing telephone line, one man cannot do it alone.

Q. Frequently he did that, fixed trouble on the line?

A. He never was at home very much to do it, he was always in school.

Q. Will you please answer the question? Did he frequently do the trouble work on the telephone line?

A. When he was at home in the summer, probably he would go out once or twice in the year.

Q. Do you know whether that trouble work required him to adjust the wires when he was up on the poles?

A. I don't know anything about that.

Q. Did your system have cross arms on the poles?

A. No, sir, not when he worked on it. No, sir, only just one or two in town. But at the time he used to work on it, there wasn't any cross arms.

(Witness excused.)

LAWRENCE PANTER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. RICHARDSON:

How do you spell your name?

A. P-a-n-t-e-r.

Q. Panter, is that it, or Painter?

A. Panter—no “i” in it.

Q. Where do you reside, Mr. Panter?

A. Cornucopia.

Q. Where did you reside on or about the 28th day of last July?

A. At my place in Cornucopia.

Q. Are you acquainted with John Bisher, Junior?

A. I am.

Q. Were you acquainted with him on the 28th day of last July?

A. I was.

Q. Did you see him at work on the transmission line of the Cornucopia Mines Company?

A. On that day.

Q. On that day?

A. Yes.

Q. How came you to notice him that day?

A. I was out in my field picking berries.

Q. Did you see him up the pole?

A. I did.

Q. Did you see him up more than one pole?

A. Just on that one.

Q. One pole. What attracted your attention?

A. I was close by. I could see them work, and

heard them talk.

Q. And you heard him halloo.

A. I heard them talk when they were working there.

Q. Do you know what happened while he was working on the pole on that day, and about what time?

A. About ten o'clock in the forenoon.

Q. What happened?

A. Why, when it happened, I didn't see, but I heard directly groaning, my attention was directed to it, and just then the other man had him down partly off the pole.

Mr. SMITH: I didn't hear that.

A. When this happened I didn't see. I was to work—I was too busy myself. But I heard him groan then directly, and then that pulled my eyes to that direction, and I saw he was up—the other man lowered him down about a third way of the pole. Meantime the team came along just then, and he rushed up, and they relieved him from the pole.

Q. That is all you know about the facts in this case?

A. That is all I can tell.

#### Cross-Examination.

Questions by Mr. SMITH:

You say you saw him working?

A. I saw him to work, yes.

Q. What was he doing?

A. They were up on the cross arm, both of them.

Q. That is all you saw?

A. They were working there. That is all I could see.

Q. Could you see what they were doing?

A. They were repairing insulators.

Q. Could you see it yourself?

A. I could, yes.

Q. Do you know what part of the work he was doing?

A. No. No, I do not.

Q. Then you cannot say whether he was there working, or whether he was just watching the other fellow, can you?

A. Oh, no, they were moving about, they were working.

Q. You were a quarter of a mile away practically, weren't you?

A. Oh no, 500 feet.

Q. A tenth of a mile?

A. 500 feet at the most, I guess.

Q. And you don't claim to know anything about how this happened?

A. No. I was busy picking berries, and the attraction came when I heard them hallo—groan.

Q. Picking strawberries, weren't you?

A. I was.

(Witness excused.)

Mr. RICHARDSON: Do you admit the expectation of life?

Mr. SMITH: What does it say?

Mr. RICHARDSON: 43.53.

Mr. SMITH: The defendant admits the American mortality table shows an expectancy at eighteen years of 43.53 years.

Mr. RICHARDSON: We will rest, I believe, your Honor.

Mr. SMITH: Defendant moves for a non suit, upon the ground that the evidence of the plaintiff and his witnesses does not show any negligence of the defendant whatsoever. It shows that the plaintiff does not know how this injury occurred, and the facts of the injury are left to inference.

COURT: I will overrule the motion. You may proceed with your testimony.

Mr. SMITH: We will note an exception, your Honor.

#### DEFENDANT'S EVIDENCE.

W. H. HARBERT, a witness called on behalf of the defendant, being first duly sworn, testified as follows.

#### Direct Examination.

Questions by Mr. SMITH:

What is your name, please?

A. W. H. Harbert.

Q. And your age?

A. 26.

Q. Your residence?

A. Cornucopia.

Q. And your occupation?

A. Electrician.

Q. Are you the person who has been referred to in this testimony?

A. I am.

Q. You were the lineman out there at that time, were you?

A. I was.

Q. How long have you been following electrical work?

A. About seven years.

Q. Where have you followed it?

A. I have followed it at Cornucopia, Portland, Eugene, Astoria, and Chicago, Illinois.

Q. What particular course of study have you followed?

A. Well, I have taken Scranton. I have gone to the U. of I, and to the U. of O.

Q. What is the U. of I.?

A. University of Illinois. I have gone to the University of Illinois. I have never graduated.

Q. How much study did you do at the University of Illinois along these lines?

A. I was there pretty close to a year.

Q. And the U. of O., is that the University of Oregon?

A. Yes.

Q. You were there about how long?

A. I was there about a year.

Q. How long did you take any course in Scranton?

ton—that is, a correspondence course?

A. Yes. I have finished up one course, and been about a year and a half in a higher branch.

Q. What course is it you have finished?

A. I have finished the course called electric line construction. I am taking the complete electrical engineering course at present.

Q. During all the years you have been working, you have always been studying, have you?

A. Yes, sir.

Q. How many years have you been a lineman?

A. I have been a lineman ever since I have been in the business.

Q. I will ask you to refer to this cross arm. Do you now identify that as the particular cross arm upon which this work was being done?

A. Yes, that is the same one.

Q. How long had you worked there on this particular line?

A. I went to work there on July 11, 1912, I think, pretty close to that.

Q. What kind of wires did they have there, as to being insulated or not?

A. How is the question again, please?

Q. These high voltage wires up there, were they insulated or not?

A. No—bare copper.

Q. Now, from your experience as a lineman, what will you say is the proper way as to a cross country high voltage wire, to insulate it with weather insula-

tion or leave it bare?

A. I wouldn't have much to do with it with insulation on. That is, I would touch it more carefully than if it was bare. I prefer bare wire myself. I haven't heard in my life of a transmission line using insulated wire, and I have seen a few of them.

Q. Tell us where you have seen them?

A. Out from Portland here to Cascade Locks, all the way along you will notice high tension line, bare copper, about No. 2, carrying about 6600 volts, I judge from the insulation, but nothing less than that. And also from Eugene to Albany, and most any of these transmission lines out of Portland here, you will find the bare copper.

Q. Why is it you prefer bare copper to this weather insulation?

A. Well, because weather insulation is good for a few months. After rain, and the dry weather, this insulation punctures. A man will take the chance with that he would not on bare copper.

Q. It would be a deception to him, would it?

A. Yes, I should consider it dangerous.

Q. Isn't it a fact that, in your business, this weather insulation is regarded as much more dangerous than the bare wire, for that reason?

A. Yes, it is regarded that way.

Q. You are always on guard on a bare wire, aren't you?

A. Yes, sir.

Q. And the weather insulation, it is impossible

for you to tell whether it is good or bad—isn't that it?

A. No, you cannot tell. That is the proposition.

Q. Now, this weather insulation, is that insulated to control the electricity or keep it confined, or just on account of inclemency of the weather?

A. Well, it is used in cities around buildings, it is required as a fire protection, but merely as a fire protection.

Q. Now, do you know what a cable is?

A. Yes, sir.

Q. Where they use a cable?

A. I do.

Q. Where do they use that?

A. They use it underground, and in mines, submarine.

Q. They don't use it out in cross country like this?

A. Not on high tension. The telephone company uses it in the city sometimes.

Q. Do you know also of insulation that is used in power houses where the wires come out of the machines, down around the machines, bringing it up, running from one machine to another, do you know of that insulation?

A. Yes, sir, that is leaded cable.

Q. Do they ever use that kind or character of cable out on transmission cross country line?

A. That couldn't be thought of at all—impractical on account of the expense. It would cost you \$5,000,000 to run five miles.

Q. Now, do you know anything about the danger

that is encountered in handling these bare wires up on poles?

A. Well, in what way?

Q. How many years have you handled bare wires on poles?

A. Oh, I guess on and off, seven years. I think that was about along the first work I ever did.

Q. Referring to this specific line here, will you tell the jury—illustrate, just step down, please, to this arm, will you, Mr. Harbert, and stand facing the jury. (Witness comes down). Now, we will say you are up on a pole.

A. Well, if I was on a pole, the first place I would be standing would be—a wire here and a wire here, a wire here—I have my arm over this wire, and do my work right here.

Q. In that 30 inch space?

A. In that 30 inch space. Here is the other wire over in there. I put my arm over this wire, and do whatever work I have to do.

Q. Crowded for room at all?

A. No, I don't see how I would be crowded. Plenty of room there with 30 inches.

Q. That is the regulation distance, isn't it?

A. Yes. I could swing out here as far as I wanted. If I didn't have enough room, I could swing out here two feet, if I wanted to, and work this wire here. But I should consider that is a fair distance anyhow. I don't need to.

Q. No danger of any induction from one wire to

another, is there?

A. It would take about 200,000 volts to arc that far.

Q. To arc a foot?

A. Yes. It takes about 210,000.

Q. You never heard of arcing from one wire to another where there is 30 inches between?

A. No.

Q. Do you know the longest arc that is drawn from one of these wires?

A. You take 1,000,000 volts—one wire at each end, you burn the copper. That is on account of high frequency. It is sixty cycle. It has not taken an arc.

Q. What do you mean by sixty cycle?

A. That is frequency.

Q. Frequency of the alternating current?

A. Yes, pulsation. The alternating current is a pulsating current.

Q. And they use that on transmission wires in this country for lighting purposes?

A. Yes, it is standard voltage for light and power. Straight power voltage is usually thirty cycles, but where there are lights to be used, they use sixty cycles, because a thirty cycle will dim down and come to brightness, while sixty cycles is so swift, you cannot notice the light die down and come up again.

Q. Which one of these insulators were you taking off or doing away with?

A. I was working on the middle one.

Q. Taking away the glass?

A. Taking away the glass and putting on the porcelain.

Q. Why was that?

A. Because the test—the break-down test, on the leakage of this insulator in the weather is only supposed to be tested 2300; punctures and leak in damp weather.

Q. What were you doing? How were they increasing the efficiency of the plant that required this higher porcelain?

A. We were stepping up the voltage from 2300 to 6600 volts.

Q. Did this young man Bisher know about that? Did you talk to him about it?

A. I don't remember. I think we talked about these subjects, what we were doing, putting in the appliance. That was, of course, most of our conversation, was electricity.

Q. Do you know whether he was studying electricity at that time, or not?

A. I couldn't say that he was.

Q. What interest did he take in the work?

A. He took a very good interest in the work, everything that was going on, asked me lots of questions, and I tried my best to answer everything that I could.

Q. Gave that information to him?

A. Yes, sir.

Q. Now, after you had finished on the outside wire over there, will you demonstrate to the jury how

you would fix the inside wire?

A. Well, after that wire is finished there, standing here, the other wire is out there, I untie this wire and take it—of course I am down about this position,—lift it, lay it over there, swing it over here somewhere, and go to work on this wire. The wire is on the other side of this plate.

Q. That gives you a thirty inch space again?

A. It gives me thirty inches, yes.

Q. Safe, is it?

A. I don't see how it can be otherwise, 18 inches across.

Q. Isn't that the customary way of handling such things as that?

A. Well, in this case it is, yes. It is a protection. It is not necessary. I could take and work four wires on there just as easy, but where there is only three wires, it might take a little extra precaution.

Q. So that with three wires on that four pin cross arm, you had more space than is customary?

A. Yes. It was a four pin cross arm.

Q. How far from centers to centers?

A. 12 inches, 18 inch in the middle, something like that.

Q. You have heard something about this body protector, they term a sow-belly on the work?

A. Yes, sir.

Q. After finishing the two outer pins, could you in any way use that thing to protect you while you were working on the middle one?

A. I don't see how I could, no.

Q. Do you know whether it is ever used on that kind of a cross arm out there?

A. Never. It is never used in a three phase transmission line, because there is two standard ways of running transmission lines. There is two standard ways of running transmission line—one is by the way we have here, running two wires on this side, the next pole run them over on this side; and the other is to run two wires here and the saddle pin here. So either way you can make it, you have no use for a sow-belly, as they call them, for protection.

Q. Where do they use that body protector?

A. That is used in the city where there is more different wires on the same pole, where a lineman must stand against one wire, and reach over maybe a couple of wires to do what work he is doing.

Q. That is where it is necessary for him to throw his body agains some of the wires to get at the other, is it?

A. Yes, but he must lean against this wire, for his own protection, and reach over.

Q. The way you were handling that, there was no use of that at all?

A. No. I wouldn't care for it at all.

Q. Do you remember at the particular time in question, how much work had been done on this cross arm?

A. I do.

Q. Tell the jury, please.

A. These two outside wires had been tied in.

Q. What do you mean by that?

A. Well, the tie lines had been taken off, the insulators changed, and the wires tied back again.

Q. They were in place, were they?

A. They were. This wire was laying over here. It had been already taken off this glass insulator, and the insulator had been thrown down on the ground. The wire was laid over there. I had just started to put my insulator on here, like that, as the accident happened, the wire being laying over there.

Q. Now, how much of your body was above the wire?

A. Well, I was standing about this much up. Usually my arm comes along here. I always put my arm over the wire.

Q. What work could Johnnie Bisher do in the position that he says he was in?

A. Well at the time of the accident, he couldn't have done a thing.

Q. Was he doing any work at the time of the accident?

A. No, at the time of the accident he was standing on the pole, he was leaning with his left arm hold of this wire, just as a rest, leaning back. He was standing in this position. And when I seen him, that hand was just thrown up, and hit right across the wrist. The contact on the right hand was across the wrist. It might have been up further, too. But the whole hand just was stuck there. Of course, when it hit the

other wire, it stuck.

Q. What did you do?

A. I loosened my safety, and pulled out my hooks, so they would be loose, and reached over and knocked that arm off.

Q. What do you mean by your safety?

A. The belt. If there was anything there, that would make me stick, we might both have been hurt. It took me down the pole pretty much already. The strain might have lifted me right off the pole.

Q. You looked to his safety, then, the first thing?

A. Certainly.

Q. You struck his arm?

A. Certainly.

Q. What happened to you?

A. Well, it knocked me off the pole.

Q. Your belt was unfastened at that time?

A. Yes. The first thing I done was to unhook my safety, kind of loosen up my spurs a little bit, so in case anything did happen, it would knock me off.

Q. Did you request him to come up there to help you at that time?

A. No, sir.

Q. Did you at any time request him to work on these poles on that work with you?

A. No, sir.

Q. What was he there for?

A. Well, he was there to help me carry insulators, send the insulators up to me.

Q. How did you handle getting insulators from

him up to you?

A. I had a rope tied on my belt to a concentrate sack, similar to a gunny sack, tied on the end, to pull them up.

Q. He would be down on the ground, would he?

A. Yes, sir.

Q. A position of perfect safety?

A. Yes, sir.

Q. Will you kindly explain to the jury whether his presence on that pole made it more dangerous for you?

A. Well, yes. Say that I should be working on a wire here, and for some reason he could rest on this other wire, one wire couldn't hurt him no way or manner at all; but if our foot should touch, or our elbow, or anything, that would tie us both to a wire, that would complete the circuit.

Q. That would get you both, wouldn't it?

A. Yes, sir.

Q. Did you ever explain that danger to him?

A. Yes, sir, I think I have.

Q. Now, you heard some testimony here about rubber gloves.

A. Yes, sir.

Q. Did you ever work with them?

A. No.

Q. Why not?

A. I am scared of them.

Q. Tell the jury why.

A. Well, a man might put a pair of rubber gloves

on, come up a pole, and you would puncture them, take hold of the wires, why, it would be the same as having a bare hand, if there was any kind of holes in them at all—if there was any contact, if you had the contact. With one wire there is no contact—12,000 volts is just as easily handled as 2300. I handled 7,000 volts just a little while before I came down here; damp weather, too,—snow and cold. But you take the gloves, and slivers in the poles, or anything like that cut the gloves, a man might take chances with them, you know, thinking they were safe.

Q. Do they make your hands sweat?

A. They are considered a death trap with most linemen; that is, hot wire men.

Q. You are what they call a hot wire man?

A. Yes, sir.

Q. Did this company up there ever direct your attention to the gloves?

A. Yes, sir, Mr. Betts asked me if I wanted rubber gloves.

Q. What did you tell him?

A. I told him no.

Q. You were the lineman, the only lineman there, were you, at that time?

A. Yes, that is what I hired out for.

Q. You say you didn't use these gloves?

A. No, sir.

Q. Did you hear the testimony here about these wrapped nippers?

A. Yes, sir.

Q. Well, now, will you explain to the jury about the wrapping on the nippers, or twistors, whatever you call them.

A. I cannot see what use that should be. Now, rubber gloves and wrapped nippers and things like that may be used on trolley lines, or something fallen on the ground, a person to get hold of it and stand on the ground. But I wouldn't risk it then. I would rather take a little board and pick it up—put a board under my feet. And the pliers, I cannot see why they would be used, because you have got to have this hand on, you have got to have hold with one end. What good is the insulation on the other, as far as slipping the other wire there. I will take a wire and put on here and short it any time.

Q. If, in your work, you were working with these nippers, and a piece of wire you were tying onto that insulator there should happen to hit one of the other wires, would it hurt you?

A. No.

Q. Why?

A. Because the electricity wire is a good conductor. Electricity takes the shortest circuit. It will run across there. If you take a tie wire onto this, it will hit it over further.

Q. It runs the wire rather than the flesh, does it?

A. Yes, takes the shortest route.

Q. Just like anything else, taking the easiest conductor?

A. Yes.

Q. How long have you worked on wires where three of them were strung on cross arms like that? Just tell the jury, please.

A. I worked up there, I worked on it all the time the last eight months on this one particular job; that is, different times. I worked on it steady most of the summer. I do work on the line now. It is a higher voltage, of course. We have 6600 volts on the line now.

Q. They have stepped it up to 6600, have they?

A. Yes, sir.

Q. Running over the same size wire?

A. Yes, sir.

Q. You handle these wires, 6600, the same way, do you?

A. Certainly.

Q. Any more danger with the 6600 than with the 2300?

A. Not a bit.

Q. Is it possible for you to get a shock with just one contact?

A. No, not unless the voltage gets away out of sight. Take 12,000, anything up to 12,000 volts, there is no need to worry.

Q. Anything short of 12,000 doesn't throw off any atmosphere of electricity?

A. No, 12,000 volts, if a person had damp poles, such as that, it might make a little difference.

Q. When it gets up to 20,000, does it throw off a sort of leakage?

A. Well, yes, there is a brush a little.

Q. That static electricity is not sufficient to injure a man, is it? ----

A. No, the static cannot injure a man. It is dryness that everything has to be to handle it. A very little dampness on 20,000 a brush will occur, make an arc and conductor.

Q. Would there, in your judgment, be any static electricity on a 2300 volt wire?

A. No.

Q. Any perceptible amount?

A. Can't never feel it unless you have some kind of ground, but that would not be called a static.

Q. When this young man got hurt, he was not hurt by any static condition there?

A. No, sir, he had hold of both wires, or else he hit one hand against the other wire.

Q. Came in contact with them, did he?

A. Yes, sir.

Q. Do you know of any conceivable duty, is there any possible duty, that a lineman has to discharge that would require him to catch two of those live wires at the same time?

A. No, sir.

Q. Now, there is a complaint here about a telephone wire on these poles.

A. Yes, sir.

Q. How far down was that telephone wire?

A. Seven feet, I think.

Q. From its position, was there any danger, or

was there any connection, any possible connection, between that telephone wire and the injury above?

A. No, there was about 2½ feet below where my feet were.

Q. What substance is a telephone wire made of?

A. Iron wire.

Q. Iron. Do they carry any electricity, as a rule?

A. Well, yes, there is high frequency in telephone wire, battery service.

Q. Just a light battery service?

A. Yes, sir.

Q. What you term high frequency, but not much voltage?

A. Yes, sir.

Q. Not much ampre?

A. No.

Q. Very light?

A. Yes.

Q. No danger in handling a telephone wire, is there?

A. No, I never found any.

Whereupon proceedings were adjourned until 10 A. M.

Portland, Ore., April 10, 1913, 10 A. M.

W. H. HARBERT, resumes the stand.

Direct Examination continued.

Questions by Mr. SMITH:

Now, I believe you stated yesterday that you had put on the new insulator on both the outside pegs?

A. I did.

Q. The wires were tied in?

A. Tied in, yes, sir.

Q. Now, how many poles are there on this line, do you know?

A. In the neighborhood of eighty-nine or ninety. Eighty-nine.

Q. About how long is the line from the plant to the mill?

A. Well, about 100 feet apart. It is about 8900 feet—a mile and a half.

Q. Now, did you do the work of completing that line, putting the insulators on?

A. I did.

Q. Did you ever have any helper there on the line?

A. No, sir.

Q. A man hired to help you?

A. No, sir.

Q. You completed it alone, did you?

A. Yes, sir.

Q. Now, do you know what Johnnie was doing while he was up there on that pole?

A. Well, he was up there to see what I was doing. He wanted to learn the business, and I was showing him everything I could.

Q. Did you hear him testify yesterday that you had told him to come up and help you, or words to that effect?

A. Yes, I did. I heard him testify.

Q. Well, had you ever done so?

A. No.

Q. Do you know, can you tell whether his presence there, an inexperienced man or boy, either one, say an inexperienced man, would be as safe for you with an inexperienced man there, as it would alone?

A. No, it really would not, because he would make the contact there. That is, one person on one wire, and maybe the other would be touching the other wire with your foot, or any contact whatsoever, would hold you both there, the same as taking hold of the two wires.

Q. You heard him state yesterday, did you, about his position on the pole, about his chin being up just above the cross arm so he could see?

A. Yes, sir.

Q. Was there any work he could do in that position?

A. Well, not in that position, no. He would have to be a little higher to do any work to speak of.

Q. Now, as he stood facing you on the pole, you were working on this peg I believe?

A. That is the one.

Q. Which way was your body turned?

A. Let's see. My right hand was on that side. I was on the other side of that cross-arm.

Q. You were over on this side, and you had your right side turned towards the cross-arm, did you?

A. Yes, I had it toward that glass insulator. My right side was about where that glass insulator is, and I was just about the middle of that.

Q. Now, part of your body was touching that outer wire, was it?

A. Well, I cannot say to that. It would not have made any difference. I could have leaned up against that because I was not touching anything else but the insulator at the time.

Q. You were putting this porcelain insulator in where the glass was, one like that?

A. Yes, I just started to put that on.

Q. Will you tell the jury what this groove across the top of this is for.

A. That is to lay the wire in. It is a top groove insulator.

Q. How do you tie it onto the insulator itself?

A. I take about a 42 inch tie wire in tying that on it, put the wire under here, double it over the wire, and then across to here, and wind it around, make a little do-up on the end.

Q. You do that by yourself, do you?

A. Yes a person could do it themselves easy, because a person standing here, they are working right here over this wire, one on each hand.

Q. Now, do you remember before you went up there to work on the line, do you remember when Mr. Buxton showed you how he wanted the wire tied?

A. I do.

Q. Were you tying them the way he told you?

A. Yes, sir.

Q. Do you remember at any time that Mr. Buxton showed Johnnie how to tie the wires?

A. I don't remember a thing about it. If he did, I surely must not have been there, because when he showed me we were in the store. We had a supply room in the store underneath the building. We sat there, and so Buck wanted a special tie, that was the way he wanted; and I told him I would tie any way he wanted. We sat down, I expect half an hour, and talked over different ties. I never saw Mr. Buxton after that, until after the accident. That was only a couple of days.

Q. Did Mr. Buxton at any time, in your presence, instruct Johnnie how to make a tie?

A. No, not in my presence.

Q. Do you remember whether Johnnie was present at that time, or not?

A. In the basement? No Mr. Buxton and I was alone. He usually came up and give me orders what to do, came up to the house.

Q. Mr. Buxton was the head electrician there, was he?

A. Yes, sir.

Q. Now, to make this plain, the work that you were doing at that time when Johnnie got hurt, was work in which you could not use your pliers at all, was it?

A. No. I was just screwing on the insulator, I granced up, and he was stuck on the wire.

Q. About this weather insulation that they have spoken of, if you had a wire that was insulated with weather insulation, and you would try to make a tie

on it there, what would be the first thing you would have to do with the insulation?

A. I would have to cut clear through to the copper, make the tie whole. You cannot tie it with insulated wire. You have to use iron wire to tie it. And you would have to cut right through the insulation and hit the copper.

Q. The first thing you would have to do would be to remove the insulation, wouldn't it?

A. I would just squeeze the wire right through the insulation.

Q. Well, now, isn't it also true that when the weather insulation is broken once thereafter the rain or the snow or the weather conditions affect it very materially, and it deteriorates quite rapidly?

A. Yes, it deteriorates rapidly after a puncture. After the first puncture, why, it will deteriorate very fast after that.

Q. Do you know what the average life of weather insulation is, as against the weather?

A. Well, I should judge, I couldn't say for sure, but between three and six months.

Q. That is, as to weather itself?

A. Yes.

Q. Well, now what would be the practicability of any company keeping its wires insulated with new weather insulation?

A. Well, if they had to insulate their wires every time that the wire punctured, they would have to construct a new line every few months; that is, to

keep it guaranteed to be insulated.

Q. Would that be practicable for any company?

A. I shouldn't think so.

Q. Why not?

A. Why, the expense. You would have to shut down. You cannot put a new wire in unless you use a double pole line.

Q. Now were you present—did you have any talk with Johnnie after he was hurt?

A. Well, yes, I was there. I was with Johnnie after he was hurt. Went down in the machine with him, and was at the house for, I expect, an hour afterwards.

Q. Were you there when the doctor was caring for him in the store after the injury?

A. I was.

Q. What did you do?

A. Well, I was there, and helped rub his arms for awhile, till Mr. Ladd come, and Doc and Mr. Buxton, they rubbed, why then I went out, because I was about all in about that time.

Q. Pretty tired, were you? Under the strain you were under?

A. You bet.

Q. Now, did you notice yesterday the condition of his left hand and arm?

A. Yes, sir.

Q. And the fact that his right arm is off up close to the elbow?

Mr. SMITH: How many inches below the elbow

do you know, Mr. Richardson?

Mr. RICHARDSON: About two or three—two inches.

Q. Well, whatever it is, the jury saw. Now, you claim that he had his hand, he had hold of the wire with his left hand?

A. With the left hand, yes, sir, was the hand he was resting on the wire, on this side.

Q. Now, I wish you would please tell the jury whether, if you have a tight hold on a wire, and voltage goes through it, we will say 2300, and with the other hand you touch another one which hand is it that is going to get the burn?

A. Why, the one that you touch, because if you have a tight wire, you will get more of a shock, but less burn. Wherever it arcs, wherever the wire is right close to the hand, but not quite touching, it will arc across; that is, after it touches once, it draws an arc.

Q. What do you mean by an arc?

A. That is the fire.

Q. Just like a stroke of lightning?

A. That is the burn. The arc, that is the fire.

Q. From the fact he had a burn above the wrist, started up to the arm, and his hand showed no burn, how would you explain that?

A. Well, if he had a tight hold on that wire whenever he caught the current by the contact of the other hand, it could draw his arms in any position. It holds the muscles.

Q. You say his muscles were badly contracted when you went in the store?

A. Yes.

Q. Which muscles?

A. Why, his arms. His fingers.

Q. His muscles were knotted, were they?

A. Yes.

Q. You helped rub out those knots?

A. Yes, sir.

Q. Now, I will ask you if he was standing as I stand, with the pole in front of him?

A. Yes, sir.

Q. And you say he had hold of this wire with this hand?

A. The left hand.

Q. And some way he must have thrown this hand up and touched the other?

A. Yes, that is correct.

Q. Now, when that happened his body could not go forward for the reason of the pole, could it?

A. No.

Q. Therefore, it went back, drawing his arms?

A. Yes. He was leaning this way, resting on that. I didn't see him throw the arm up, but it must have been the second that it hit there.

Q. Any flash, or anything of the kind?

A. No I never heard a sound. I just glanced up, and he was unconscious, strained that way, all doubled up.

Q. Now, how long was it after you first saw him,

till you got him to the store, till you got medical aid?

A. How is that again, please?

Q. How long was it after you saw him in that trouble, until you got the doctor there?

A. It could not have been over half an hour. We were about three-quarters of a mile from town. Just as it happened, the boy came up with the team, and we ran the horses all the way up town.

Q. You took him down from the pole alone, did you?

A. Yes. When I got him down to the telephone wires, as he said yesterday. He was so heavy, I got this boy down below, and I let him down to him. I took him down to the first part of the pole. I threw a rope around his arm, and took him down to the telephone wire. We got him down the pole. They were I guess, about, oh, I should say ten feet above the ground. Then after that I had to get the boy to help me.

Q. Now, did you see those marks in his elbows yesterday?

A. Yes, sir.

Q. How do you account for that?

A. Those are rope burns, where I burned him with the rope, getting him down the pole. I just threw a rope around, and let him down by the arms. When we got to the store, I noticed those burns across the arm.

Q. Did you ever command him to come up on that pole and help you?

A. No.

Q. Did you ever ask him to do any part of the work there?

A. No.

Q. Did you hear him testify that he had made some ties up on the line?

A. Yes, sir.

Q. When was that, and under what circumstances, if he did?

A. Well, he helped—he came up there, and I let him finish one end there on one wire.

Q. Showed him how it was done?

A. Yes, sir. But I worked every pole.

Q. You say you finished all this work without any help at all?

A. Yes, sir.

Q. Well now, is it too much for one man if he is lifting that wire from this peg, is it a hard strain, or too much for one man to lift it over here?

A. I should judge on a straight line, it would be about forty or fifty pounds lift.

Q. You never had any difficulty in handling the work, did you, Mr. Harbert?

A. No, sir. I have lifted wire on the length of ten poles, the length of ten poles going down a gulch, because the top pole would be on the opposite side of the gulch.

Q. After he was hurt, and while you were there in the store, or when you were there in the automobile,—when you were in the store, do you remember

Mr. Buxton coming in?

A. Yes, sir.

Q. Did you hear any talk between Mr. Buxton and Johnnie at the time?

A. Yes, sir, I heard them talking. Mr. Buxton was very badly excited, walking up and down the store there.

Q. Do you know whether he was the first man that was ever hurt up there or not?

A. Why I don't know myself, no. I never heard of any one else.

Q. You say Mr. Buxton was walking up and down the store, was he?

A. Yes, sir.

Q. And he is the head electrician?

A. Yes, sir.

Q. Did you hear Johnnie talk to him at that time?

A. Yes. Shortly after Johnnie was a little relieved, and Mr. Buxton was very worried, and I think Buck says, "How did it happen," or something. And he was worried. And Johnnie says. "I don't know, Buck, but you don't need to worry. It was all my own fault." Something about those words.

Q. That was the substance of the conversation, was it?

A. Yes. I don't remember the exact words.

Q. Now, did you hear him, did you also hear him talking with Mr. Ladd in the automobile?

A. Yes, we were talking. We talked together on the way down at different times—not very much.

Q. You came down with him in the automobile?

A. I came down with him in the automobile. We talked a little on the way down.

Q. Where did you bring him down on the machine?

A. Down to Mr. Bisher's house.

Q. How far would that be?

A. That is in the neighborhood of 13 miles.

Q. Did you hear him make any statements during that trip as to how it happened?

A. Well, I think the same conversation came up on the way down, as to how it happened, how he come to do it.

Q. What did he say?

A. And he says, "I don't know. I must have got careless, and threw my hand up there."

Q. You don't know yourself how it happened, do you?

A. No, I don't know.

Q. If he had stood there on the pole, and kept off from both wires, it would not have happened at all, would it?

A. Why, I don't see how it could have.

Q. What do you call a boy that runs along the ground and carries those supplies?

A. Usually call him a grunt, or helper, things like that.

Q. Did his duties as helper out there require him to get into any dangerous place at all?

A. No.

Q. Did you ever hear of a helper using rubber gloves?

A. Never did.

Q. Or using this body protector, this sow-belly they speak of?

A. No.

Q. Or being furnished with nippers that are wrapped?

A. No, sir.

Q. Do they furnish the helper—is he exposed in any way to any danger in his duty on the ground just carrying the material?

A. No.

#### Cross Examination.

Questions by Mr. RICHARDSON:

Mr. Harbert, you are working for Mr. Betts, the Cornucopia Mines Company?

A. Yes, sir.

Q. You were engaged in working for Mr. Betts, were you, on the 28th of last July?

A. I think so.

Q. You have been working for him ever since?

A. Yes, sir.

Q. Now, you are at the present time in the employ of Mr. Betts of the Cornucopia Mines Company?

A. I was just before I left there, yes, sir.

Q. You haven't left there for good, have you?

A. No, sir.

Q. You expect to go to work for him after you get

through with this case?

A. Yes, sir, that is my intentions.

Q. Now, Mr. Harbert, where were you working before you began working there? When did you first begin working for Mr. Betts?

A. July 11th.

Q. Receiver of the Cornucopia Mines Company. When?

A. I went to work up there on July 11th.

A. On July 11th. Where had you been working immediately prior to that time?

A. In Halfway.

Q. At Halfway?

A. Yes, sir.

Q. What were you doing in Halfway?

A. I was working in a general merchandise store.

Q. How long had you been working there?

A. About a year, I guess, something like that.

Q. About a year in the general merchandise store?

A. Yes. I was all around the farm and the store, and in the Halfway National, or in the American State Bank, I worked in there awhile.

Q. And how long had it been since you had worked on an electric line carrying a voltage of 2300 volts?

A. In the neighborhood of—on transmission line, about two and a half years, I guess, three years.

Q. Been about two and a half years since you had worked on a transmission line?

A. Yes, sir, doing work. I have handled 2300 volts outside transmission line.

Q. Now, where did you work on a transmission line that carried 2300 volts?

A. I worked on 2300 volts in Astoria.

Q. In Astoria?

A. Yes, sir.

Q. What transmission line was it, what company?

A. The Astoria Electric Company.

Q. How is that?

A. Astoria Gas & Electric Company.

Q. Now, what lines, what kind of line have they, three phase transmission line?

A. Yes, they have three phase, two phase; 500-6,000.

Q. Now, what is the number of volts that they generate at their power plant?

A. Which power plant?

Q. The power plant that they send the electricity to a sub-station, the transformer?

Q. Which one do you refer to? You see you can generate any voltage from 110 up to 2300, step it up to most any voltage you want.

Q. What I am asking you, Mr. Harbert, is what is the amount of electricity that they carried over their lines to the first transformer?

A. Whereabouts?

Q. In Astoria, Oregon?

A. Well, they have different stations there. That is, they have one station—they have the Hammond Lumber Company at present; but then they have their own steam plant, used slab wood for fuel.

Q. How many power plants did they have?

A. They had one there at that time.

Q. Whereabouts was that located?

A. Down town, in Finn Town, I think.

Q. What part of town?

A. Lower town, right near the river, near the Columbia River.

Q. What river?

A. Columbia.

Q. What part of the town? Which end of the town?

A. Finn Town, I think is what they call it. That is the lower end, that is down the river.

Q. This is owned by the Astoria Gas & Electric Light Plant?

A. Yes, sir.

Q. They have only one generating plant?

A. At that time that is all they had.

Q. I am speaking of that time you were working there?

A. Yes, sir.

Q. Now, how many volts of electricity did they generate and send out over their wires to the first transformer?

A. 2300 volts.

Q. 2300 volts?

A. Yes.

Q. That is as high a voltage as they use in Astoria?

A. At that time, yes, sir.

Q. 2300.

A. At that time, yes.

Q. How far was this sent down in the streets of Astoria?

A. It was sent all over. There was one 6,000 volt line there.

Q. There is one 6,000 volt?

A. Yes, series arc. But that went all over the city.

Q. Was that generated by the same plant?

A. Yes.

Q. Didn't you just say a minute ago that they only generated 2300 volts?

A. I believe they did, but we put this series arc lighting afterwards.

Q. Then their main transmission line that leaves the generating plant carried a voltage of 6600?

A. Yes. You see they have different voltage. That series arc, and then they have the lighting, most all of that, in the multiple is 2300.

Q. Where did you work for the company when you were working for the Astoria Gas & Electric Company?

A. I did different work for them. I worked in the gas.

Q. You did electric work?

A. I did a little of everything there.

Q. You worked in the generating plant?

A. No.

Q. Where did you work?

A. I worked in the office, and done a little line

work.

Q. What did you do in the office?

A. I was bookkeeper.

Q. You were bookkeeper in the office?

A. Yes, sir, I kept books.

Q. You kept books?

A. Yes, sir.

Q. Now, where did you work on the line?

A. I have gone out and shot trouble on the line.

Q. You have gone out and shut trouble?

A. Yes.

Q. Now, what kind of trouble?

A. Oh, different little jobs that come up. I don't remember just what work I did do, but I have different time, I have done different work.

Q. Now, had you ever worked as a lineman before this time?

A. Yes, sir.

Q. Whereabouts?

A. I done line work in some of the first work I done in the east.

Q. Whereabouts?

A. Hoopston, Illinois.

Q. What company?

A. Hoopston Gas & Electric Company.

Q. That was the first line work that you did?

A. Yes, sir. I worked there for 18 months.

Q. In what capacity?

A. I done most anything that come up, read meters, done line work, dug post holes, done office work.

Q. You did some office work?

A. Yes, sir.

Q. And once in awhile they would send you out to fix trouble on the line?

A. Yes, I have gone out and done work. In a small place a man was required to do a little of everything, as you understand.

Q. How long did you work there?

A. I worked there 18 months, that is, in actual work. I worked on and off there when I was going to school in different capacities, but I never done any actual work only those 18 months.

Q. Then where did you go to to go to work?

A. Portland.

Q. You came to Portland?

A. Yes, sir.

Q. Did you go to work here in Portland?

A. Yes, sir.

Q. For the Portland Railway, Light & Power Company?

A. Yes, sir.

Q. Did you work as a lineman for the Portland Railway, Light & Power Company?

A. I worked for the O.-W. R. & N. Company when I first came here. No, I didn't work as a lineman for the Portland Railway, Light & Power Company.

Q. Did you work for the O.-W. R. & N. Company?

A. Yes.

Q. Whereabouts?

A. At the Albina shops, under Mr. Cunningham.

Q. You didn't work for the O.-W. R. & N. Company as a lineman, did you?

A. No, sir.

Q. You didn't work for the Portland Railway, Light & Power Company as lineman, did you?

A. No, sir.

Q. Didn't you say yesterday that you were familiar with the lines of the Portland Railway, Light & Power Company in the City of Portland?

A. I told you I had worked on and off at these different places, I think. I didn't say that I had done line work here in Portland. But I am quite interested in it. I noticed their lines, and different things.

Q. You notice when you walk along the street?

A. Yes, sir.

Q. Have you seen any lines of the Portland Railway, Light & Power Company in the City of Portland that were not insulated, that carried 2300 volts?

A. Right outside of Portland here, from Portland to Cascade Locks, it goes.

Q. I am speaking of lines, Mr. Harbert, that carry 2300 volts in the corporate limits of the City of Portland.

A. I cannot swear that I have, inside the city limits.

Q. Don't you know, as a matter of fact, that there is not a transmission line within the corporate limits of the City of Portland, owned by the Portland Railway, Light & Power Company, or any other company, that is not insulated, and if it was not insulated,

they would be subject to a fine by City Ordinance? Don't you know that?

Mr. SMITH: That City Ordinance business, that is immaterial. An ordinance of the City of Portland would not be law in this case. There is no ordinance requiring them to insulate out in the mountains.

COURT: I don't think there is any use pursuing that inquiry, because you are inquiring about lines within the City of Portland, and this accident occurred outside of any city, on a transmission line running across country, and there is no parallel between the two. I do not understand why you pursue an inquiry on that line.

Mr. RICHARDSON: I understood him to testify yesterday that the transmission lines in the City of Portland carried 2300 volts, were not insulated. That is the reason why I was asking this question.

COURT: He has already said he has not seen those lines of the City of Portland uninsulated.

A. I beg your pardon. I don't believe I said transmission lines were not insulated here, because I really don't know. I said outside the city, transmission lines across country, anything like that, are uninsulated.

COURT: I understood you to say that you have seen no lines inside of the city that were not insulated.

A. Well, outside I saw that were uninsulated the transmission lines.

COURT: I understand that outside they are not insulated. Inside they are insulated.

A. Yes, that is correct.

COURT: That is what I understood you to say.

A. Yes.

COURT: I think that is enough.

Q. What lines running into the city, and outside of the city, do you know, of 2300 volts, that are not insulated? Just name the line to the jury.

A. There is one line running from here to Cascade Locks.

Q. Cascade Locks?

A. Yes, sir. Clear up the line out of Portland. It is run on the right of way of the railroad, and it has the telephone wires running along on the same poles.

Q. It runs from Cascade Locks to where?

A. It runs all along to all the farmers and the different people. Now, I inquired about that. That is information that is given to me.

Q. Of whom did you inquire?

A. I cannot say the gentleman's name. I asked a gentleman up the line about this line.

Q. When?

A. Coming down here.

Q. Coming down here?

A. Yes, sir.

Q. You asked him. How do you know he knew?

A. I don't know.

Q. What did he tell you?

A. He told me it had 6600 volts running on there.

Q. Carried 6600 volts?

A. Yes, sir.

COURT: I don't see any use following up that in-

quiry. I suppose that that line was uninsulated.

Mr. RICHARDSON: At 6600. I thought he said 2300.

A. That is 6600.

Q. Do you know of a 2300 volt line now, that leads into the City of Portland that is uninsulated?

A. No, I don't, 2300 volts. I don't think there is but very few coming in here at that voltage.

Q. Now, Mr. Harbert, when you began working for Mr. Betts, did you tell him that you were an experienced lineman?

A. I hired out to do the work. He never asked whether I was.

Q. What work did you hire out to do?

A. I hired out to do line work.

Q. How much line work did he have for you to do?

A. To change that line there, and he told me after he got that changed he had some houses he wanted wired. After I finished up my wiring that he would give me a shift in the plant. That was Mr. Buxton and I talked it over. I never talked with Mr. Betts about it at all. That is the way I went to work up there.

Q. I believe you stated it was very easy for you to work on this line without injuring yourself from shock, yesterday?

A. I did.

Q. Now, how long would it take you to tie a tire wire up there?

A. I cannot say how long. I should imagine—

Q. Where you had plenty of room to work in, it would not take you very long, would it?

A. No. I should imagine it would take a couple of minutes,—five minutes to each one. That is, just the tying. There is wire to take off, insulating changes, and change pins, and different work like that; may have to take the cross arm off, and put a new one on.

Q. You might have to take the cross arm off?

A. Yes.

Q. And you did that?

A. Yes, sir.

Q. You took some cross arms off?

A. I took that one off the 6600 volt line, and put a new one on.

Q. I mean, at the time you were changing these insulators, did you take any cross arms off?

A. Yes, I took two off, I think, on the job.

Q. You found them in a defective condition, and took them off and changed them?

A. Not necessarily. They didn't suit me. They were split a little, so the pin didn't set in right, so I put in new cross arms.

Q. How long would it take for you to change a wire, change an insulator, untie it and put on a new one?

A. Well, I should judge about five minutes.

Q. About five minutes?

A. In that neighborhood. Not any longer than that. That is giving plenty of time.

Q. Now, was it a little tiresome to climb a pole and do this work?

A. It was the first few days I went on the job. I hadn't been doing that work for some time. I hadn't followed that line steady.

Q. What did you do when Johnnie would be up the pole making a tie?

A. How is that question?

Q. I say, what would you be doing when Johnnie would be making a tie on the pole himself?

A. I don't know what I would be doing, because he never did.

Q. How is that?

A. He never did it, so I don't know what I would be doing.

Q. He never did it?

A. No, not alone.

Q. Then you didn't take it time about, as he said yesterday?

A. No.

Q. He was mistaken about that yesterday, wasn't he?

A. Yes, he must have been mistaken, because this was the eighth pole that he got hurt on, the eighth pole we done any work on.

Q. How is that?

A. That was the eighth pole from where I started.

Q. Now, you say Johnnie was to work on the ground, I believe, just to carry insulators. Is that all?

A. I don't know. Mr. Buxton hired him. That

is my understanding.

Q. You didn't tell him to do anything?

A. No. That was not my duty to tell him.

Q. I beg your pardon?

A. It was not my duty to tell him what to do, or what not to do.

Q. You didn't say anything to him?

A. Oh, I don't know that I didn't say anything to him. I couldn't swear to that. I don't remember saying anything.

Q. You don't know what Mr. Buxton said to him?

A. No, I don't.

Q. Well, what was he out there for?

A. At work.

Q. Along the line? You said he was along the line, wasn't he?

A. Well, he was to carry insulators, cut tie wires, do things like that; send them up to me when I wanted them. That was my understanding.

Q. You knew he was to help you, didn't you?

A. How is that?

Q. You knew he was instructed to help you, didn't you?

A. Yes.

Q. Now, I believe you stated that you realized that it was a great deal more dangerous for two of you to be on the pole than just for one, didn't you?

A. I think so, yes, sir.

Q. And what did you say to Johnnie when he began to climb that last pole that he climbed.

A. The last pole?

Q. Yes.

A. Right at the time or just a short time before, on that very same pole, I was cautioning him to not let our feet get together, anything like that.

Q. Cautioning him not to let your feet get together?

A. Yes, sir, told him not to touch me at all up there.

Q. Had you said anything—

Mr. SMITH: I submit the witness is entitled to answer the question counsel asked him in his own way.

COURT: Yes, the witness ought to be allowed to answer the question.

Mr. RICHARDSON: I mean for him to answer, but I am trying to hasten the cross examination. What was the question?

Mr. SMITH: The question was, what did he say to Johnnie when he started to climb that pole.

Mr. RICHARDSON: Yes.

Mr. SMITH: Let him answer.

A. When he started to climb the pole? I don't think I said a word to him when he started to climb. I was up there working.

Q. Did you say anything to him when he got up to the top?

A. I think it was on that very pole—I wouldn't swear to it—that I cautioned him about the wires.

Q. Now, he had been up other poles? He had

been climbing other poles before this, hadn't he?

A. I think he was on—

Q. What about the pole before?

A. I should say that he was on three poles before that with me.

Q. On three poles. What did he do on those poles?

A. Well, he brought up insulators, and on one pole he tied the wire on one wire. I showed him how and let him do that.

Q. Now, didn't you say yesterday that you took the insulators all up by a rope?

A. Did I say all of them?

Q. Yes.

A. I don't know whether I said that or not. I think I said that was what I understood his duties to be; that he sent the wires up to me. But I didn't say that he wasn't on a pole, because he was.

Q. Then was there any necessity for him to be on the pole if you had a rope to take up the insulators?

A. No, not necessarily. No necessity.

Q. Not necessarily?

A. No necessity, no.

Q. And what did you say to him when he got up on the pole?

A. I cautioned him about being on this pole, told him he didn't have to come up there. I didn't have any authority to fire him down, or anything like that.

Q. You didn't?

A. No, sir.

Q. You didn't want to hurt his feelings, did you?

A. Well, Johnnie—I liked Johnnie, and would show him everything I could.

Q. Did you show him how to make a tie?

A. I think he watched me, yes.

Q. He didn't make the tie himself?

A. No.

Q. He never took hold of an insulator to change it, or to lift a wire, did he?

A. Why, I cannot say whether he did or not. I don't remember.

Q. You don't remember?

A. No, not whether he lifted a wire or not. I know in this particular case he didn't.

Q. But you cannot testify as to what he did on the other poles before you reached this last pole, on which the accident happened?

A. Well, he watched me there, and on one pole, as I told you, he tied over on one side there on one of the wires.

Q. Now, did you tell him that he was not expected to climb any poles?

A. Yes, sir.

Q. You told him that, didn't you?

A. I told him there was no use in it; he was not paid for that.

Q. Well then, tell me, Mr. Harbert, why he had pliers and a belt and climbers with him. Explain to the jury why he happened to have these with him all the time?

A. Well, here is why he had those—anything that could happen to me, or anything that he might be able to help me off, or something like that. Not that I was afraid of anything, but it was just the idea of having a man along that knew how.

Q. So he was wearing this belt and these climbers for the purpose to aid you in case you had an accident?

A. Yes, sir.

Q. That was the object?

A. Yes, sir.

Q. Why did he send home for a different pair of pliers?

A. I don't know.

Q. You don't know that?

A. I don't know why. I think I heard afterwards that he did, because I know I sent his stuff home afterwards—his pliers. They were a different kind. I remember when he had them too.

Q. You knew he sent home for his own climbers, didn't you?

A. I knew he had his own climbers.

Q. You didn't know that he sent home for them?

A. I didn't know whether he sent home for them, no.

Q. You didn't have any climbers for him, did you?

A. Why, I had another pair of climbers there, yes. There were two pair of climbers there. Neither one of them belonged to me.

Q. Who was furnishing these belts and climbers

to him?

A. I couldn't say that. I don't know who furnished them.

Q. Who furnished them to you?

A. Well, I don't know whether they were Mr. Buxton's or the company's. They were all there. Mr. Buxton came down—he says, “take what you want.” So I took what tools I wanted.

Q. Then you got the tools yourself, didn't you, Mr. Harbert?

A. How is that?

Q. You got the tools and appliances yourself, didn't you?

A. I got them myself?

Q. Yes. You went after them.

A. Yes. I went down and he gave them to me.

Q. Buxton told you to get them?

A. He gave them to me.

Q. Well, now did you get the climbers out for Johnnie?

A. I cannot say that I did.

Q. Well, do you know who did?

A. No.

Q. Did Buxton?

A. I might have done it. I don't remember that.

Q. You might have done it?

A. Yes. I won't say that I didn't.

Q. You don't remember. You remember, though, distinctly, you remember very well what Johnnie said while he was suffering on the day of the accident?

A. Yes, sir.

Q. You remember that very plainly, don't you?

A. Yes, sir.

Q. Now, you testified, I believe, Mr. Harbert, that you heard Johnnie say to Buxton that it was his, Johnnie's own fault?

A. Yes, sir.

Q. That was while he was there in the store rubbing his arms?

A. Yes, sir.

Q. Do you know what the doctor was giving him at that time?

A. No I do not.

Q. Did you help chase him up and down the road any to keep him awake?

A. I did it alone.

Q. How is that?

A. I done it alone myself.

Q. Why did you run him up and down the road?

A. I took him out on the road to ease his mind.

Q. What was the object in running him up and down the road?

A. He was partly sleepy and tired.

Q. Why?

A. I did not know why.

Q. They didn't tell you why he was sleepy, or why you should walk him up and down the road?

A. I don't know whether they told me or not.

Q. Then, why were you walking him up and down the road?

A. Why, the boy was hurt. He was in pain, and things like that. I took him up and down the road. We walked away down the road, we walked a mile below the town there, before the automobile caught up with us. Around the store there, I wanted to get him out to get him exercised, get his blood working in his system.

A. Then no one said anything to you that you were to walk him to keep him from going to sleep?

A. I think I done it of my own accord.

Q. You did it of your own accord?

A. Yes. I knew he was drowsy, wanted to go to sleep.

Q. Did you figure that his suffering was making him drowsy?

A. No, I didn't figure anything like that. I figured by walking him around, giving him exercise, it would cheer him up a little.

Q. You thought you would cheer him up with those hands in that condition?

A. Well, those hands didn't look quite so bad then. They showed burns, but I never thought for a minute—of course I don't know anything about such things, but I didn't think for a minute that the boy would lose his arms, or anything like that. It showed burns, and that is all. I didnt even give it a thought of such a thing.

Q. Wasn't he suffering a great deal with his hands?

A. Oh, yes, his muscles knotted up. That would

knot up the circulation.

Q. You walked him around so as to take the knots out of his muscles?

A. Well, we rubbed those out, but I walked him around, as I told you, to get his blood circulating, keep him from going to sleep. He wanted to go to sleep. They gave him something,—what it was I don't know. They must have given him something to go to sleep, but I was not in there at the time. If it was anything, it is just hearsay with me. I didn't see what they gave him.

Q. Where did you say, Mr. Harbert, that you got your electrical education as a lineman?

A. As a lineman?

Q. Yes, or as an electrician?

A. I got it as a lineman from experience, is all,—line construction I have studied. I have taken I. C. S., taken two courses of that; went to the University of Oregon, and went to the U. of I. awhile.

Q. You took an electrical course in the University of Oregon?

A. Yes, sir.

Q. How many months?

A. I don't remember just how long I was there. I got sick after I was there awhile, and quit.

Q. You were there two months or three months?

A. I was there longer than that. I didn't get line construction there. I was in mathematics while I was there, is all I got. It was electrical engineering, but I only got the mathematics.

Q. And what did you get when you went to the University of Illinois?

A. Same thing. I got mathematics there.

Q. Electrical?

A. The I. C. S. I have studied a little of everything with that. I am still studying it.

Q. Now, I believe you stated, Mr. Harbert, that it was only a mile and a half from the power plant to the stamp mill?

A. Now, at the present time. No, at that time, there were 89 poles 100 feet apart.

Q. 89 poles 100 feet apart.

A. Yes, sir. So it must be right in that neighborhood. I don't say it is exactly a mile and a half.

Q. Now, you stated, I believe, on your direct examination, at the time this accident happened, Johnnie had his left hand on the wire?

A. He had hold with the left hand.

Q. He had what?

A. He had hold of the wire with his left hand.

Q. Which wire?

A. This wire right here. This insulator was on this side of the cross arm. That insulator was on that. Two insulators tied in. That insulator there was tied in. This wire was laying over here. As I say, I just started to screw that insulator on. Johnnie was leaning back here on his spurs, and was holding onto this wire.

Q. What was he holding onto that wire for?

A. Why, for a rest, I should suppose. That is

what I usually do. I couldn't say that.

Q. Do you usually hold on there to rest? You get tired, you grab hold of the wire to hold yourself up?

A. I cannot say I do. But I often put my arm over anything like that. I have done that. And when he had hold of this wire, he must have flung his hand up. I didn't see him throw it up, but I must have seen it the second he got it up. That hand was laying, or looked like to me, the wire was right across there like that—he just hit that wire.

Q. Now, Mr. Harbert, did you see that burn right in through there in his right hand a little larger than a wire?

A. I seen a burn on the right hand across the wrist, up this way.

Q. You didn't see the burn then that the doctor described to the jury yesterday?

A. No, I didn't see the burn in the palm of the hand. I seen the burn down here.

Q. Did you examine it?

A. Well, I seen what I supposed was all the burns that were on the hand.

Q. So the doctor must have been mistaken in his description of the burn?

A. Well, I wouldn't swear that there was no burn there. I don't know that there was no burn there.

Q. Now, did you say anything to him while he had his arm or hand, left hand, up on that wire?

A. It happened so quick, it was all over in a sec-

ond.

Q. How was he holding that wire with his left hand?

A. This way.

Q. Just had hold of it with his hand?

A. Just had hold of it with his hand.

Q. Just gripped with his hand, left hand?

A. Yes, left hand.

Q. That is the part of his hand he has left now? You know his right hand is off entirely?

A. Yes.

Q. And he held hold of that?

A. Yes, sir.

Q. And he was in that position when the accident happened?

A. He was.

#### Redirect Examination.

Q. I believe you stated that you accounted for the fact that his left hand was not burned from the fact he had a tight grip on the wire?

A. That is the way I account for it.

Q. Now, it is said that 2300 volts will kill, isn't it?

A. How is that?

Q. What is the least voltage you know, that will kill?

A. Why, if the contact is large enough, 110 volts will kill.

Q. It depends, doesn't it, about how close to the heart the shock comes?

A. Yes, that has lots to do with it—how big a con-

tact it is between a person's foot and the arm, is usually sure death, because it goes through the heart.

Q. Mr. Harbert, I will show you three pictures marked "C", "D" and "E". I first will show you a picture marked "Defendant's Exhibit C". Will you please state what that is a picture of, Mr. Harbert?

A. That is a picture of the transmission line at Cornucopia.

Q. Showing—

A. Showing 6600 volts on there.

Q. Does it show the telephone line also?

A. Shows the telephone line below.

Q. Who took this picture, do you know?

A. I think Mr. Buxton took that picture.

Q. You know it is a picture of the situation, do you?

A. Yes, sir.

Mr. SMITH: We will offer it in evidence, if the Court please.

COURT: Any objection?

Mr. RICHARDSON: No objection.

COURT: Very well.

Mr. SMITH: Then I will just offer the three of them.

Q. I will ask you to state what this picture marked "Defendant's Exhibit D" is?

A. That is the pole that he got hurt on.

Q. Part of the same line?

A. Same line.

Q. You state this runs through a mountainous

country?

A. Yes, sir.

Q. Now, Defendant's Exhibit E, which one is that?

A. Well, that is myself up on the 6600 volt line. That is before I took that cross arm off.

Q. On the same pole?

A. Same pole.

Q. Are you working on the same side of that picture that you were?

A. Same side. Similar position.

Mr. SMITH: These three pictures, then, marked "C", "D" and "E", we will ask to introduce all three of them.

Mr. RICHARDSON: No objection.

Marked "Defendant's Exhibits C, D and E."

Mr. SMITH: Now, gentlemen, we had one of those enlarged. This is an enlargement of one of the exhibits. I think it is "E". Will you kindly tell me which one is the picture of the man on the pole? "E", isn't it. The one marked at the bottom "E".

JUROR: E.

Mr. SMITH: If you have no objection, I will offer this.

Mr. RICHARDSON: No objection.

Mr. SMITH: Then we will offer in evidence as "Defendant's Exhibit F", the enlarged picture.

Marked "Defendant's Exhibit F".

Recross Examination.

Q. Is this picture made of the pole on which the

boy was injured?

A. Yes, sir.

Q. Now, one other question, Mr. Harbert?

A. Yes, sir.

Q. You stated there were telephone wires on this pole?

A. I did.

Q. Now, how far were those telephone wires from the cross arm bearing and supporting the electric wires?

A. From the wire they are seven feet.

COURT: Seven feet below?

A. Yes.

Q. You are positive about that?

A. I measured it.

COURT: Seven feet below?

A. Seven feet below the wire.

Q. Below the cross-arm or the wire?

A. Below the wire.

Q. Seven feet below the wire?

A. Yes, sir.

Q. You measured that?

A. I measured that.

(Witness excused.)

F. E. MYERS, a witness called on behalf of the defendant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SMITH:

Now, Mr. Myers, I will ask you kindly to sit facing

the jury a little. They cannot hear very well when you talk away from them. And speak distinctly. What is your name, please?

A. F. E. Myers.

Q. Where do you reside?

A. Portland.

Q. What is your age, please?

A. 38.

Q. And your occupation?

A. Electrical engineer.

Q. How long have you been following that business?

A. About 23 years.

Q. Where have you followed it?

A. Portland and Oregon.

Q. Where else?

A. Just the one state.

Q. Your experience has been confined here, or extending out over the state, which?

A. It has been extended out over the state for the last six years.

Q. Are you a graduated electrician from any school?

A. No, I am not.

Q. Just working and studying?

A. Practical work.

Q. Now, in the business that you are in, have you ever done any line work as they call it?

A. Yes, I have done line work.

Q. Where?

A. I helped to construct the line at Cascade Locks, a small 2300 volt line—winter work—and various places where I have been at, I couldn't think of just now, where we did lots of repair work on lines. I have climbed the poles, putting on insulators, such as that.

Q. You have put on insulators and changed insulators, have you?

A. Oh, yes.

Q. Did you ever work where the lines were bare, carrying 2300 volts?

A. Yes, sir, I have put on some insulators between Chehalis and Centralia. They had 2300 volts on their line there before they changed it.

Q. Did they use their wires bare, transmission wires?

A. They did at that time.

Q. Do you know what weather insulation is?

A. I do.

Q. Will you state to the jury what it is for and what it is?

A. Well, it is to afford a certain protection, usually, against swinging short, or anything like that; but an electrical man doesn't consider it a safe protection for life or limb, as I don't think there is any manufacturer of weather proof wire will guarantee the wire up to any standard voltage.

Q. You say there is no one that will do it?

A. No, I don't think any of them will do it. In fact, they have no test tag on those wires.

Q. You say the men do not consider it is safe, that is, weather insulated?

A. Not practical linemen, no.

Q. What about the comparison as to which they think is better to work with, bare wire or wire that has got this stuff on it?

A. Well, I couldn't say about usual linemen, but myself I prefer to work with the bare wire.

Q. Why?

A. Because I am not deceived on insulation.

Q. How will the weather insulation deceive a lineman?

A. It is in various ways. Some times the deterioration of the insulation qualities of the insulation, and then there may be punctures in it, especially where you have it tied in around the pin.

Q. Now, is it practicable for any company to keep their outside transmission cross country high voltage wires, say 2300—that seems to be the magic number in this case,—2300 volts, or 6600 volts, or 1,000 volts, is it practicable for them to keep those transmission wires insulated with weather insulation so that it will protect against shock?

A. Well no, after it has been up six months or a year, after the elements has worked on the line.

Q. It would break up any company to try to keep that stuff new, wouldn't it?

A. Yes, to keep it new, it would.

Q. How long is the standard cross-arm?

A. Generally call it a four pin cross-arm, twelve

inches between arms.

Q. I will show you this cross-arm that we call mutual Exhibit B-1, and ask you from your observation of that—we agree it is four feet?

Mr. RICHARDSON: Four feet.

Q. Is that what you call a standard cross-arm?

A. It is generally the standard cross-arm, four pin arm.

Q. Suppose there are three wires, can you tell by looking at that whether there have been more than three wires on it?

A. By looking at the cross-arm itself, no, you cannot.

Q. Can you tell by the pins?

A. You can tell by the pins whether the insulators has been on the other pins.

Q. Looking at that physical condition, how many insulators have been used on it?

A. I will have to examine it to see.

Q. All right. Just step down and see.

A. Well, this pin here looks as if it never had an insulator on it.

Q. That would be what you call three wire on that, wouldn't it?

A. Three wire, yes.

Q. Now, you see also where that has been up against the pole, don't you, Mr. Myers? I will ask you to kindly tell the jury whether or not it is a safe place, whether the wires are too close as you see those pins, too close for a lineman to work in safety if he is

putting on new insulators?

A. No, it is not. The lineman can work and transfer his wires across there and keep in a safe place.

Q. Keep practically a thirty inch space to work in, can't he?

A. Yes, sir, all the time.

Q. Do you know what this body protector is that they call a sow-belly?

A. Never used one.

Q. Would there be any way for a lineman to use it on a place like that?

A. I don't see hardly how he could.

Q. You know what they are?

A. Never saw one; never had occasion to use them.

Q. Do you know what they are?

A. It may be what they call a safety belt.

Q. Safety protection to the body. In doing that class of work, you wouldn't use that at all?

A. If sow-belly had reference to safety belt, why, I would use one in case of getting knocked on a pole.

Q. You mean the belt that comes around the body?

A. Yes, sir.

Q. You don't know what this protector is that comes around the front?

A. I never saw one.

Q. How many years have you been in the business?

A. 23 years.

Q. Do you know about a practical lineman out in the woods that way, say, out in the mountains like these pictures show—I will show you these pictures “C”, “D” and “E”—I think it is conceded, however, that this transmission line is in a mountainous country, sparsely populated—working through a country like that, changing insulators on the cross-arms, as you have stated, what use would a man make of rubber gloves?

A. Well, on that pole line, I don’t see what use he could make of rubber gloves there, because he is up on a pole there, and nothing else around him but three wires. I do not see the necessity for using rubber gloves.

Q. Have you worked on this line in question?

A. No, not on this line I have not.

Q. You have worked at Cornucopia, though, have you not?

A. I have been up to Cornucopia and wound a machine for them there.

Q. Do you know the line?

A. I recognize part of that line.

Q. Do you know how it is constructed?

A. Well, I have got a slight idea how it is constructed. I didn’t pay much attention to the line at the time I was there.

Q. Now, you state that you wouldn’t use rubber gloves if you were a lineman up there?

A. No, I would not.

Q. Tell the jury whether it is safer to work on these poles in the heat of the summer than it is in the damp of the winter.

A. Well, it is, yes, because you don't get an induction off them in the dry weather.

Q. This injury, I believe, happened on the 28th of July. Is that the correct date?

Mr. RICHARDSON: 28th of July.

Q. In that climatic condition in that section of Oregon, with the poles in the condition in which they would be in that season—did you ever spend a summer up there?

A. I forget just what month I was up there, but it was in the spring of the year the first time I was up in that country.

Q. You have an idea of the climatic condition, then, have you, semiarid condition?

A. Yes, I believe it would be kind of warm up there around July.

Q. With that condition, with those poles about 25 feet to the cross-arm—is that correct, gentlemen?

Mr. RICHARDSON: Yes.

A. 25 feet approximately—it may be a foot less, but about that—would you see any use to which a lineman would put rubber gloves to work out there, if he was given them, putting on insulators and changing them?

A. No, I don't think he would in that warm weather.

Q. Why wouldn't you want rubber gloves?

A. Perspiring of the hands cannot deceive me on account of a puncture in the cloth.

Q. You try to keep your hands dry?

A. Yes.

Q. Isn't it a fact that if you are damp, your hands and feet or body damp, you are in greater danger from electricity than with your body dry?

A. If it is a little too close to the next wire to you, it will carry over on that.

Q. Did you ever work on a pole where there was an inexperienced man also?

A. No, I never would allow an inexperienced man to work close to me.

Q. Why not, Mr. Myers?

A. Because I would be afraid of them.

Q. Afraid of what?

A. Liable to make a contact on something and me.

Q. What do you mean?

A. Coming in contact with current, or another wire touching me while I was working on the other wire.

Q. Suppose, as an illustration, that the linemen were working, and was adjusting, we will say, this wire, and there was an inexperienced boy up on the pole also, and he should touch one of these other wires, and in the course of work, he would happen to touch the other fellow's foot, what would happen?

A. They would both get a shock.

Q. That is what you call making a contact?

A. Making a contact between the two.

Q. That is where the danger is?

A. That is the dangerous point.

Q. You have seen men who have been shocked by electricity, and know where the shock comes, don't you?

A. I have seen a couple of them.

Q. Suppose a man has a tight grasp of one wire charged with 2300 volts, and should hit the other one, which hand would show the burn?

A. The one that made the least contact.

Q. That one that had tight hold would not show much of a burn?

A. No, it would not show much of a burn in proportion.

Q. You say the one that drew the arc would show the burn?

A. That is where the heat is.

Q. That drawing an arc is just the electricity shooting across the air?

A. Shooting across and pulling the arc across.

Q. From your observation of this cross-arm, and the conditions that would exist in that country up there the 28th of July, would you say it was a safe place for a lineman to work up there on those poles, in that distance?

A. For myself, I wouldn't be afraid to work 10,000 volts on that pole line under those conditions.

Q. Without rubber gloves?

A. Without rubber gloves.

Q. What is the highest voltage you handle without rubber gloves?

A. 10,000.

Q. So you know it can be done and is done right along?

A. Between 10,000 and 11,000. When I worked for the Portland General Electric Company that was our high line coming in.

Q. You call 2300 volts high wire, or not?

A. In my estimation I would call it very safe.

Q. Although 2300 volts will produce instant death?

A. Just as quick as 10,000 or 20,000.

Q. What is the least voltage that will produce death?

A. I couldn't say on that.

Q. What is the least you know of?

A. 500, practically is about the least I know of when you get the right kind of contact right.

Q. It will produce death if contact will come so that the current passes near the heart?

A. Passes near the heart and hangs on long long enough.

Q. Now, you speak of weather insulation. I will show you this piece of insulated wire which is marked "Plaintiff's Exhibit 2" which they claim is weather insulated.

A. It looks like a piece of triple braid weather-proof wire.

Q. Now, I will also show you this wire which I

now have, that we will ask to have introduced. Will you tell what kind of insulation is on that?

A. That is what we call single braid rubber covered wire.

Q. What is the difference between single braid, rubber covered wire, and the triple weather proof?

A. Well, there is quite a bit, in my estimation.

Q. Just take your knife and show the jury the difference, please.

A. On a rubber covered wire on the outer insulation, practically has a jute insulation. You see that that is cotton insulation built up. Underneath that it has a certain thickness of rubber covering the copper. That is what they call rubber covered wires.

Q. What is the rubber there for?

A. Mostly protection against leakage or any dampness going through this outer insulation.

Q. Is there any such rubber protection on the weather insulation?

A. No, there is not; not what we call weather proof wire.

Q. You use this second, this small wire that you have there, that rubber-covered wire, that is used, as I understand it, in wiring houses, is it?

A. Houses, residences and buildings.

Q. What precautions do they take to see that even that rubber-covered wire does not come against the woodwork?

A. Why, they insulate with various insulating materials, such as porcelain—porcelain knobs.

Q. And isn't it a fact that if they leave off those porcelain knobs or porcelain tubes through which it lets through the juice, that frequently fire occurs?

A. Frequently, yes.

Q. Will waether insulation protect against the electricity leaking through, or shocking or burning in wood, if it was in contact?

A. Well, it all depends on whether it was in a wet place or a perfectly dry place. More danger in a damp place than it is in a perfectly dry place.

Q. What is the voltage of the little wire that you have in your hand?

A. That small rubber-covered wire is tested and guaranteed to withstand 600 volts.

Q. You say there is no manufacturer that will test or guarantee their weather insulation?

A. Weather proof wire, no.

Q. Now, you have seen a number of cross country wires, haven't you, Mr. Myers?

A. I have, yes.

Q. Carrying 2300 volts or more. Do you know whether they are frequently left without any covering at all—just the bare wire?

A. Well, there are a few—now, there is some lines up in the Washington and Oregon corporation's line, running between Chehalis and Centralia, was 2300 volt line, bare line. But at the present date, they have stepped it up to 22,000 volts.

Q. Do they insulate that?

A. No, that is bare.

Q. That is more dangerous, too, than 2300 isn't it?

A. Yes. Well, the reason why they use bare wire on high tension is the simple reason that there is no insulation that will withstand.

Q. What do you mean by stepping up?

A. That is raising your electric motor force from 2300 to 6600 volts, or 23,000, or whatever you want to raise it to, by transformers.

Q. You do that by passing the current through one machine?

A. Passing it through certain static transformer, we call it.

Q. That transformer converts it, or packs it up, or packs it down, so that there is about three times as much as there would otherwise be?

A. Whatever the ratio is in the transformer.

Q. On the other hand, they can diffuse it, can't they, and step it down?

A. Yes, either step it up or step it down.

Q. What do they do when they take it into a house?

A. They step it down practically to 110 or 220 volts.

#### Cross-Examination.

Questions by Mr. RICHARDSON:

Mr. Myers, when did you do some work for the Cornucopia Mines Company?

A. I believe it is about four years ago this spring.

Q. You are acquainted with Mr. Betts, aren't you?

A. Well, just about that time I got acquainted with him.

Q. What kind of work were you doing up there?

A. I rewound a 2200 volt induction motor for him.

Q. You are an electrical worker?

A. Electrical worker.

Q. An electrician, instead of a lineman. You are not known as a lineman. That is not the class of work that you are supposed to do, is it?

A. I don't hire out as a lineman, but I profess I can do line work.

Q. Do you belong to that class of electrical workers? That is, if you were going to join some union, or something of that kind, you would not be known as a lineman, but as an electrical worker?

A. Well, if I professed to be a lineman, I would join the linemen. I could take either branch I wished to.

Q. Now, you have worked in Portland, did you say, for the Portland Railway?

A. I worked 11 years for the Portland General Electric Company.

Q. In what capacity have you been working for the Portland General Electric Company?

A. I worked up from about the lowest till I had charge of their stations here in the City of Portland.

Q. Now, did you work as a lineman?

A. For a year and a half, I shot trouble on their

pole lines through the center parts of town here.

Q. Now, they have 2300 transmission lines here, with 2300 volts, haven't they, all over the city?

A. Oh, yes, they have all on the east side, and out of the fire districts on the west side.

Q. Those are insulated too, aren't they?

A. They are now, because the City Ordinance compels them to be.

Q. What is the object of this insulation, Mr. Myers, this weather insulation, what is the object of that?

A. The object of that is to give protection as far as they can in damp weather, such as that, as the telephone line pulling down and laying on it, something like that, and flash together, in various ways.

Q. Now, in dry weather, if the insulation is in perfect condition and not in bad repair, then it is insulation perfect against shock, is it not?

A. Well, I couldn't say it is, because I wouldn't want to try to prove it.

Q. They use that for the purpose of guarding the public in case a line falls on the street or should strike another line? That is one object of the insulating, isn't it?

A. Yes, sir.

Q. It is more expensive, isn't it, Mr. Myers?

A. It is a little more expensive. That is one of the objects.

Q. And you consider it safer, do you not, if it is insulated?

A. No, I do not.

Q. Well, why do they insulate, go to that expense of insulating it then? What is the object of insulating, going to that expense? How much greater is the expense?

A. How much greater?

Q. Yes.

A. Well, it depends on how much that insulation weighs to the copper. They sell it by the pound.

Q. Well, from your experience as an electrician, don't you know how much more expensive the insulated wire is over the naked uninsulated wire?

A. Well it is so much a pound, whatever that is. I have got to see what the last basis of copper is, their last card on it.

Q. Well, approximately?

A. Approximately it is the same price per pound, but there is a loss on the copper in this insulation, because you are paying for insulation, here, when you but the copper on the bare wire.

Q. Would insulated wires cost twice as much as uninsulated wires?

A. It doesn't cost a cent more?

Q. It doesn't cost a cent more?

A. No, it goes in per pound.

Q. Well, but that insulation weighs, doesn't it?

A. Yes, it weighs, but not quite as much as copper.

Q. But for the same size copper wire, then, you would have to pay the same price for insulation as you pay for copper, wouldn't you?

A. Yes.

Q. So, an insulated wire would be more expensive than uninsulated wire of the same size, wouldn't it?

A. Why, sure it would.

Q. Approximately how much? About twice as much?

A. I couldn't say off-hand, unless I see how much this insulation weighed per mile for the copper per mile.

Q. Well, you know that transmission lines carrying 2300 volts in the City of Portland are insulated, don't you?

A. Yes, because there is a city ordinance to that effect, to insulate them.

Q. What is your business now?

A. I am manager of the H. M. H. Electric Company.

Q. In the City of Portland?

A. In the City of Portland.

Q. You are engaged in selling electrical goods, aren't you?

A. Selling, repairing, building lines—anything pertaining to the electrical industry.

Q. You have transacted business with Mr. Betts, haven't you? You sold him supplies?

A. No, I haven't sold him.

Q. And done some work for him?

A. That is four years, I did.

Q. You haven't done any since?

A. I haven't done any since, nor I haven't seen

Mr. Betts until he came down to Portland this time.

Q. How long has it been since you have done any work as a lineman, in the capacity as a lineman?

A. Oh, it is probably six years.

Q. Six years?

A. Six to seven years.

Q. There has been considerable changes in transmission lines since then, hasn't there?

A. Well, they have in a way, as to the higher voltage, but the general construction is practically the same.

Q. Do you know of any lines being constructed now anywhere in the State of Oregon, that is not insulated, carrying a voltage of 2300 volts?

A. Not that I know of right at present.

Q. Now, is it customary, Mr. Myers, for electric linemen to use rubber gloves?

A. Well, some does and some don't.

Q. What about the requirements of the company that you worked for as to their linemen—the Portland Railway, Light and Power Company? You worked for them, did you?

A. I worked for the Portland General Electric Company, which is now the Portland Railway, Light & Power Company.

Q. How long did you work for the Portland General Electric Company?

A. I left them in September, 1905.

Q. Practically eight years ago. You haven't worked for them since then?

A. Not since then.

Q. And you haven't worked as a lineman since then?

A. Not as a lineman; but I have went out and did repair jobs on the line through the country. My business calls me to do almost any kind of work that I go out to do.

Q. Are you familiar with the tools and appliances of the present day linemen?

A. With the exception of that one thing which you call a sow-belly.

Q. You never saw one of those?

A. I would like to see one. I would like to see what they use it for.

Q. You didn't know that the Portland Railway, Light & Power Company furnished those to the linemen, did you?

A. They may at the present date. They did not in my time.

Q. That is seven or eight years ago? And they didn't furnish gloves in your time?

A. No, they didn't furnish no gloves in those times.

Q. And didn't require the employes to use gloves at this time?

A. They left that to the discretion of the lineman. If he wished to use gloves, why he did.

Q. Is there a practical experienced lineman without rubber gloves now?

A. Why, I don't see any of them wearing them.

Q. Do you know of any one in the City of Portland that is known as a practical lineman, and works at that business, that does not have gloves and use them?

A. Yes.

Q. Give me his name?

A. William Castleman.

Q. Where does he work?

A. He works for the Portland Railway, Light & Power Company.

Q. Castle?

A. Castleman.

Q. And he works as a lineman?

A. For the Portland Railway, Light & Power Company.

Q. What kind of work?

A. He does any kind of work on the lines, handling from 2300 volts up for them.

Q. And he doesn't use rubber gloves?

A. I have never seen him use rubber gloves yet.

Q. Did he tell you that he didn't use them?

A. I can see him with my own eyes when I see him working.

Q. Where did you see him working?

A. The last place was out in Alameda country, out there, he did a little line work out there, connecting up a motor on 2300 volts.

Q. Was he working on an uninsulated wire?

A. Practically. Wherever he takes his knife and cuts the wire, it is uninsulated at that time.

Q. But that is weather insulation like the one you hold in your hand.

A. I won't say it was like this. It may have been double weather proof.

Q. You never saw him working without gloves on naked wire, did you, uninsulated wire?

A. Only on occasions when he would make a connection, that is, practically.

Q. Well, I mean on an uninsulated copper transmission wire.

A. It would be impossible for him in the City of Portland, to do it.

Q. I say did you ever see him working on an uninsulated transmission line carrying as high as 2300 volts?

A. No.

Q. Are you familiar—I believe you stated you never saw one of those lineman protectors. They didn't use them in your days.

(Witness excused.)

FRANK A. HULL, a witness called on behalf of the defendant, being first duly sworn, testified as follows.

#### Direct Examination.

Questions by Mr. SMITH:

Will you kindly state your name?

A. Frank Hull.

Q. Where do you live?

A. Portland.

Q. What is your occupation?

A. I am an electrician, I guess you would call it.

Q. What is your age, please?

A. 28 years.

Q. Where are you working at present?

A. Working for Morgan, Fliedner & Boyce at present on conduit work.

Q. Have you ever done electric line work?

A. Yes, sir, I have done a great deal of it.

Q. How many years did you do that work?

A. About nine years.

Q. Where please?

A. Well, at Kelso, Washington, Chehalis, Centralia, Spokane, and Chicagof, Alaska.

Q. You have constructed plants?

A. Yes, sir.

Q. And you also do general electric work, do you?

A. Yes, sir.

Q. Do you know how to handle these transformers?

A. I do that work, yes, sir, handling transformers.

Q. Now, in constructing these lines, you became acquainted, did you not, with the general character of what they call a standard cross-arm?

A. Yes, what we call a standard cross-arm, I have, yes.

Q. The cross-arm that I refer to is this one over here, Mutual Exhibit B-1, conceded to be four feet in length. Is that the customary length of the standard cross-arm?

A. Yes, for that kind of line, I think it would be.

Q. And you have examined that? You can see from where you are, whether the pegs are set about customarily? Is that right?

A. About 12 inches, yes.

Q. Now, I will show you some pictures, Mr. Hull. They are marked down at the bottom in lead pencil, C, D and E, conceded to be pictures of this transmission line. Have you ever worked on transmission lines out in the country like that shows this to be?

A. Exactly the same kind.

Q. Where?

A. Chehalis, Kelso.

Q. How high a voltage was carried over the wires at those places where you worked?

A. We carried regular 2300 there. That is, that type of line carried 2300.

Q. That is what you call a three phase line, is it?

A. I presume that is three phase, three wire, yes, sir. We had three phase there.

Q. Have you noticed whether these cross country high voltage wires—we will speak of 2300 volts as high voltage—whether those cross country high voltage wires, have you noticed whether they are insulated or not?

A. Some of them are insulated, and some of them are not.

Q. As a practical lineman, and an electrical worker, which do you consider safer to have them insulated or uninsulated, safer for the workmen?

A. Well, I consider very little difference.

Q. Now, you know what weather insulation is, don't you?

A. Yes.

Q. Isn't it a fact that if you have one of these cross country, high voltage wires and you have to tie the wire into these insulators on the pegs, that you have to cut the insulation for the wire to make the tie?

A. Well, you don't have to cut it off, but in making the tie you surely destroy the worth of the insulation anyway—tie it tight enough to stay.

Q. That would expose the workman right there then, anyway, wouldn't it, the very nature of the work he is doing?

A. Oh, yes, he is exposed all the time.

Q. Make the wire just the same as if it was not insulated, wouldn't it?

A. Yes, just the same.

Q. Have you ever worked with bare wires on these transmission lines?

A. Yes, sir.

Q. What is the highest voltage which you have handled on bare wires?

A. The highest voltage that I have ever handled has been 2800—2500.

Q. You used rubber gloves, did you?

A. No.

Q. You handled that amount with your bare hands?

A. Yes. I have used rubber gloves, of course, but that was under certain conditions.

Q. What were the conditions?

A. While we would be working on a junction pole, or if it was raining real hard and everything was wet, we had to go into it at night, I would take gloves when I couldn't see, on shooting trouble.

Q. You have worked in Spokane?

A. A little; not very much.

Q. Did you ever work out in Central Oregon, that dry country, or out through Lewiston, Idaho?

A. No, I worked on telephone work out there. I worked on the Nez Perce plant, from Lowell up to Nez Perce.

Q. That is up where they have plenty of rain?

A. No, they haven't much rain there in the summer time.

Q. They don't irrigate?

A. No.

Q. It is not in the semi-arid belt?

A. Yes.

Q. When you get down to Lewiston, you have to irrigate, don't you?

A. I didn't work at Lewiston.

Q. Did you ever work in eastern Oregon, in the semi-arid country?

A. No.

Q. Isn't it a fact that a dry country is safer for electric workers than a wet one?

A. Oh, yes, of course it is a great deal safer, where

everything is dry.

Q. Along about the latter part of July, in a dry country like there is in eastern Oregon, would be one of the safest times of the year to work on a line?

A. I would consider it so. That is, it would be safe.

Q. Well, now, suppose in that part of the year, the 28th of July, the latter part of July, in that semi-arid country there, that a lineman was required to go out and change the insulators, they were getting ready to step up the current from 2300 to 6600, would it be reasonably safe for him to work without rubber gloves on the work?

A. Why, I would consider it would be just as safe as any way. I wouldn't wear the gloves to do it.

Q. Why?

A. Because they are a bother, that much more weight on you, when it came to taking off the insulators and putting them on, it makes that much more junk.

Q. It makes your hands sweat?

A. Of course your hands would be sweaty in rubber gloves, certainly.

Q. Suppose you puncture them, a little splinter goes through them?

A. That spoils the efficiency of the glove.

Q. It opens you up to danger, doesn't it?

A. Yes.

Q. Now, with this standard arm, Mr. Hull, these pegs, the outer pegs, are twelve inch centers. The

one across the middle I didn't measure, but the two outer ones are twelve inch centers, with three wires on there, with thirty inches from peg, skipping from one peg over to the other one, would you consider that too close, or plenty of space, or what would you, to work?

A. I would consider it a very safe line. I have worked in lots tighter places than that would be, especially from what your pictures show, with only one cross-arm, a very safe line. In other words, I would consider it a snap as a lineman, to work on that kind of a line.

Q. Then you don't think the wires would be too close there for the safety of the workman, do you?

A. No, but if he knew what he was doing.

Q. From your experience as a lineman, Mr. Hull, will you tell the jury whether you would want an inexperienced boy to be on the pole with you?

A. Well, no, I wouldn't want one to be there.

Q. Why not?

A. Well, it isn't very safe to have some one up there that is inexperienced working with those wires. I know of two or three accidents that have been caused by men that were inexperienced, working on poles with other men. And again that is the way the young fellows, or grunts, as we call them, usually learn. We usually let them come up the pole once in awhile, but it is not the safest way to do.

Q. You say you allow them to come up once in awhile, but it is not as safe?

A. No, it is not as safe. This man that was burned at Hillsboro about three months ago, that was caused by an inexperienced workman.

Q. Explain in your own way, how an inexperienced man can cause trouble on a pole for an experienced man.

A. I don't know just what kind of trouble you would want to cause. Would you want to bring him in contact with the line?

Y. Yes, suppose a man is working on this line out here, and the regular lineman is on this side of the pole, and he has lifted the wire over this peg over here, and is working in this thirty inch space, and is working at putting on the insulator here, now suppose there is an inexperienced boy on this side, that has his hand up over the wire over here, how is he liable to cause trouble?

A. Well, if the wire was loose, he could easily knock it around, grab it or something, throw a contact on there. He could, if he had hold of the line, and had contact, if he touched the other man he would give him contact providing he was touching also, if it was dry. If it was wet he would get it anyhow.

Q. With one man touching one wire and another man touching another, independent wire, would there be danger also through their feet touching or their knees?

A. Certainly.

Q. In that case, both of them would get shocked, would they?

A. Yes, in that case, both of them would get shocked.

Q. Now, you have worked enough around lines to know what the boy is kept for, the ground man, the grunt, as you call him. Is there any duty that he is performing that requires him to get up on that pole?

A. No, there is no duty. If he is a grunt, he has no business up the pole.

Q. Do they furnish grunts with rubber gloves?

A. No.

Q. Or these body protectors, these sow-bellies?

A. No.

Q. Or do they furnish them with pliers with wrapped handles?

A. Well, they usually have pliers, because they cut the tie wires for you, and cut off the ends of lines, and such stuff as that. They have always a pair of pliers.

Q. How do they get materials up from the ground?

A. Pulling it up with a hand line.

Q. A man that is equipped carries a hand line with him in his belt, does he not?

A. Yes, sir.

Q. The man simply ties the sack on the end of that, and pulls it up.

A. Whatever he wants he ties it on and pulls it up.

Q. You have seen in your experience the effect of electric burns, haven't you?

A. Yes, two or three.

Q. Suppose that a man were working on this pole—you see the picture of it—the regular lineman over here, and the young fellow on this side, suppose the young fellow was standing down the pole so that his chin was just about even there, can you think of any duty he could perform, or aid in performing with the other fellow changing those insulators?

A. Why, I don't know as he would be of any material help to a man there at all.

Q. Suppose that he were in that position, and had his hand up ahold of this wire, and that through some way he must have come in contact with another wire, which hand would show the heavier burn, if he had hold of the wire, 2300 volts, with his left hand, and happened to hit another one with his right hand or arm?

A. The burn would show up where the arc would be, he more than likely would get a shock, and the contact would be where the arc would, of course, be where it was loose, where the contact was being broken.

Q. The hand that was closed over the wire then, wouldn't show the burn?

A. Naturally wouldn't be burned so bad.

Q. And the one that would be burned?

A. Would be where the arc hit it.

Q. You mean the arc, the lightning flash or stroke of jumping electricity?

A. Yes. Oftentimes happens when you let go—if you let go there, the arc would follow.

Q. In that connection have you ever noticed, or what is the fact, if you can take, say, 110 volt wire that is bare, and take another wire and draw it off, and just when it leaves it will spark?

A. Yes. It is what we call pulling out the arc—pulling an arc out with it.

Q. Will you tell us, Mr. Hull, where there are some transmission lines that you know of, carrying a voltage of 2300 where they use the bare wires across country?

A. There is one at Kelso. There was one on the Kalama River that carried 6600. That was all bare wire. I believe it is yet. I know that it is—that is all bare wire. It carried 6600. There is one in Chehalis, between Chehalis and Centralia.

Q. You constructed a line in Alaska, I believe?

A. Yes, I constructed a plant in Alaska.

Q. For a mine?

A. Yes, for a mining company.

#### Cross-Examination.

Questions by Mr. RICHARDSON:

Where do you live, Mr. Hull?

A. I live in Portland.

Q. Whereabouts in Portland?

A. 602 Stanton Street.

Q. How long have you lived in Portland?

A. I have been here this last time about six weeks, is all I guess I have been here.

Q. Where did you work before coming here?

A. Worked for the Washington and Oregon corporation.

Q. Whereabouts?

A. Building a line between Chehalis and Castle Rock, Washington.

Q. What kind of a line?

A. High tension line.

Q. What was the voltage there?

A. That voltage will be 22,000.

Q. That was for furnishing motor power to run cars?

A. It is for lighting and power service.

Q. Power and lighting? You didn't have any 2300 volt lines at that point?

A. On that line?

Q. Yes.

A. No. Well, there was 2300 temporarily cut in. I didn't work on it though.

Q. In what capacity did you work up there?

A. Well, I was the foreman of the raising of the poles for about twenty miles of the line. I never worked on the line.

Q. What company did you work as a lineman for the last time?

A. The last time?

Q. Yes, as an electric line man?

A. I worked for the Chicagof Gold Mining Company.

Q. In Alaska?

A. Yes. No, I worked as a lineman for the Wash-

ington and Oregon in Chehalis off and on. I helped them out temporarily when they would be in a pinch.

Q. Was that a transmission line of 2300 volts?

A. Yes, 2300 volt line.

Q. Now, you stated, Mr. Hull, that you had worked with gloves—you had used gloves?

A. Yes, I have used gloves.

Q. What did you use the gloves for?

A. Well, if at night I would go on a pole that had a great many wires, or raining or wet, I would use the gloves if it was dark.

Q. What did you use the gloves for? What was the object in using them?

A. Well, they are more or less protection.

Q. It is insulation, Mr. Hull, isn't it?

A. Rubber is an insulation, yes, sir.

Q. If you have rubber gloves, and they are in good condition, you can handle live wires without incurring the same dangers that you would if you didn't have the gloves?

A. Yes, sir, they would be of some assistance.

Q. Now, is it necessary to destroy the insulation in tying an insulator on a wire that carries 2300 volts like this?

A. Is it necessary to destroy it?

Q. Yes.

A. No, it is not necessary.

Q. Is it necessary to destroy the insulation?

A. It is not necessary, but nine linemen out of ten will do it.

Q. Nine linemen out of ten will do it?

A. Certainly.

Q. Now, the wire would come over there, would it not, Mr. Hull?

A. On that insulator it would, yes.

Q. On the other insulators it would go on the side?

A. One side.

Q. What sized wire would you use on that in tying that?

A. Oh, I would use a No. 4 perhaps, or 6—4.

Q. What about a No. 10?

A. No. 10?

Q. Yes.

A. Well, No. 10 will hold it. That is all up to the person that wants to do it.

Q. No. 10 would not likely cut into the wire as easy as a No. 4, would it, destroy the insulation.

A. A No. 10?

Q. Yes.

A. Why, if they pull it hard enough it would just the same.

Q. But it would not be necessary to cut the insulation. That insulation is rather hard, isn't it?

A. Yes, it is rather hard.

Q. It would not be necessary to destroy it in order to fasten it substantially on an insulator?

A. Well, it might with No. 10 wire. You might have to cinch it up tight to hold. It would eat into the insulation. You cannot twist a wire around an-

other, and twist it up tight to hold anything, without destroying the insulation more or less.

Q. About how long is the life of insulation of that kind?

A. It is all according to the climate.

Q. In a dry climate how would it be?

A. In a dry climate, if it was put up in the summer time, it would last quite awhile.

Q. Last a year or two?

A. No, no. It would never last a year in the summer, not a whole year in this country.

Q. In a dry climate, I mean.

A. I don't think it would in a dry climate.

Q. Do you know how often the Portland Railway, Light & Power Company have to change theirs here in the city?

A. No, I am sure I do not.

Q. You are not familiar with that?

A. No, I am not familiar with that.

Q. You say it won't last over a year? How do you know it won't last over a year?

A. From experience.

Q. What experience have you had in making changes in cities? Have you made changes within the period of a year of wire of this size insulator?

A. Never necessary to make any changes, but when you have a line strung up, and you are working on that line constantly, you can tell by observation whether the insulation is any good or not.

Q. What do the company do when they find the

insulation is no good?

A. They don't do anything. They couldn't tear the lines down and built it up again.

Q. They couldn't?

A. Well, they could if they made a business of spending their money doing it.

Q. An insulated wire is more expensive than a naked wire, isn't it?

A. A little bit more.

Q. About how much more, approximately.

A. Well, I couldn't say how much more it would be. I don't know what the insulation weighs, per pound. It varies with the different size wires.

Q. Insulation doesn't affect the efficiency of the plant or the system, does it?

A. Affect the efficiency?

Q. Yes.

A. No, sir.

Q. The object of insulating is for the purpose of protecting the wire from coming in contact with other wires, or in case the insulator is broke, from setting fire to the pole on a damp day or a rainy day, is it not?

A. Well, that is the idea of it, but it doesn't do it.

Q. It doesn't do it?

A. No, not in practice it doesn't do it.

Q. Well, why do they go to that extra expense then to insulate?

A. Well, I am sure I couldn't tell you why they do it.

Q. You know in all cities they all are insulated, don't you?

A. Oh, yes, the wires are insulated. Of course taking in the swing, in the center of the spans, an insulated wire will stop it lots of times from shorting an arc up. It will assist in that purpose.

Q. Taking a system as described here carrying 2300 volts, Mr. Hull, you don't mean to say that if the wires had been insulated and the insulation had been in good repair and condition, would the accident then have happened?

A. Well, I cannot say. I don't know how long the wire was there. If the insulation had been perfect, of course the accident would not have happened.

#### Redirect Examination.

Q. Is it practicable to maintain one of those cross country voltage wires like this, with perfect insulation?

A. No, sir.

Q. Or with perfect weather insulation?

A. No, sir.

Q. There is not a plant in the United States of which you have any knowledge that does that, is there?

A. No, sir.

Q. It would break them up, wouldn't it?

A. Yes, sir.

Q. Have to change their wires so often, wouldn't they?

A. Yes, sir.

Q. Isn't it also true, Mr. Hull,—it has been suggested to me by some of these electricians; I don't know anything about it,—but with this wire crossing that porcelain insulator, you then tie it around here some way, don't you, the tie wire?

A. Yes.

Q. What is the tie wire made of?

A. The tie wire, we usually use copper wire.

Q. And that is brought around here and then up onto this. It is also wound around very tightly, isn't it?

A. Yes, sir.

Q. And that is where you use the pliers?

A. Yes, sir.

Q. And no doubt that would destroy the efficiency of the insulation, wouldn't it?

A. To a certain extent, yes.

Q. So that the work they were doing would of itself have destroyed the efficiency of the insulation to a large per cent?

A. Yes, sir.

#### Recross Examination.

Q. Now, in making a tie, do you use your hands or your pliers?

A. I usually use my pliers in making my tie.

Q. You don't touch the tie wire with your hands?

A. Putting the tie wire on I use my hands, certainly, to start it.

Q. You start it with your hands?

A. Yes, throw it around the glass with my hands, and tighten it up with the pliers.

Q. But after you begin to tighten it, or it might come in contact with the naked wire, you use your pliers? What kind of pliers do you use?

A. We don't use the pliers on account of contact. I use the pliers so that I can grip the wire to tighten it up.

Q. You don't use insulated handles on your pliers, do you?

A. Usually use insulated handles on my pliers. Sometimes I don't. Usually I do, though.

Q. What is the object of insulating the handles of your pliers?

A. It gives you a much better grip on the pliers, and they are good for the insulation.

Q. Protects you against shock?

A. Why certainly.

(Excused.)

Dr. J. P. WALSH, a witness called on behalf of the defendant, being first duly sworn, testified as follows.

#### Direct Examination.

#### Questions by Mr. SMITH:

Dr. Walsh, will you kindly state your name?

A. Dr. J. P. Walsh.

Q. Where do you reside?

A. Cornucopia, Oregon.

Q. You are a regularly admitted and licensed practicing physician in this state?

A. I am.

Q. You are the doctor who first took charge of Johnnie when he was hurt?

A. I was.

Q. The first doctor there. Where was he, when he was hurt, when you first got charge of him?

A. He was brought into the store.

Q. The store there at Cornucopia?

A. The store at Cornucopia, Oregon.

Q. You examined him very carefully, did you?

A. I examined him very carefully, and placed him on the counter on pillows.

Q. We understand that out that way from the city you have to take the best ways you can, and that is all you had there, the counter, to lay him on?

A. That is all I had. I have an office up at the mine. I didn't have any place there down town.

Q. What did you do?

A. I placed him on the counter, and there was considerable contraction. That is, there was great contraction of the fore arm, and the hand, and the fingers. They were all flexed like this.

Q. The muscles seemed to be knotted up, did they?

A. The muscles were knotted up in the arm above here, and in the fore arm they were very hard and knotted.

Q. What was the first thing you had the boys do,

or the first thing you ordered done?

A. The first thing we did after putting him on the counter was to start in and rub the arm, the fore arm first. We rubbed the fore arm and the arm, to reduce the contractions. We rubbed it jointly. And all this time the boy was suffering considerable pain, evidently a great deal of pain.

Q. Those electrical injuries are always very painful, aren't they?

A. Yes, where there is contraction. It is due undoubtedly to contraction of the muscles. And we rubbed his arms altogether probably for two hours, and we finally reduced the contraction to a large extent, in the arms.

Q. That aided circulation, did it?

A. Yes. The circulation in the hand was very poor when we started in. When we finished rubbing his hands, which was probably two hours or two and a half; I don't remember distinctly; I just state it approximately—the circulation was evidently restored.

Q. When you quit rubbing?

A. Yes, when we quit rubbing. The fingers were relaxed, and he could open his hand, and the fingers were relaxed. Now, we got all through, then I asked Johnny to move his fingers, and he did this. (Illustrating).

Q. With both hands?

A. With both hands, yes. With both hands—he couldn't close his hands entirely. I am stating the facts just as I believe they are. He couldn't close his

hands entirely, but partially; but he could move his fingers and thumbs of both hands, and his arms were almost perfectly relaxed; that is, the arms. The fingers were not quite relaxed, and we could not get them thoroughly relaxed.

Q. Now, is it possible for a doctor to tell the extent of an electrical burn by examining the surface?

A. Absolutely no, not at the time.

Q. A deep electrical burn goes in so you cannot tell?

A. They sometimes go away into the bone.

Q. Could you at that time form any opinion of the extent or the amount of the damage that had been done?

A. No. I told the boys that I couldn't tell. I told him, I says, "I don't know the extent of the damage. It may be slight and it may be very great. There is no way of telling, only from the abrasions, the burn on the surface.

Q. Did you notice any burn about his right hand?

A. On the right hand—I am stating this just as I remember it.

Q. That is all we want. That is all any man can do.

A. I don't know that I can state it positively. There was a burn across the wrist here, a severe burn. And I warned the boys several times, in rubbing the hand and the arms not to rub that burn—it was painful. Now, I don't remember the burn across the palm of the hand at that time.

Q. Of the right hand?

A. Of the right hand. I don't remember the burn across the right hand at that time. I cannot recall it. There was a burn up here between the fingers.

Q. On the back of the right hand?

A. On the back of the right hand; between the index finger and the second finger, there was a burn. Now, I didn't notice that burn, because we were rubbing the palms of both hands while we were doing that, and we didn't rub the wrists here where the burn was, but we were rubbing the palms of both hands. The only way I can explain that was, when the muscle here, or the burn extended up here, I don't know, and that the injury was caused afterwards.

Q. Indicating contact with that first on the wrist, and then on the back of the hand?

A. Yes.

Q. The turn of the hand?

A. Yes, of course. When he got the arc, involuntarily his arms contracted.

Q. Now, did you give him any opiate or injection that night?

A. I did, yes, sir. I gave it to him that forenoon. It was about half to three quarters of an hour after he came into the store. The boy was suffering severe pain, and he was asking me constantly to give him something, to do something; that he was suffering pain. And after examining him carefully, and rubbing him, I could see no reason why he should not receive an opiate to relieve the pain.

Q. Did you give him a heavy dose or just a light dose?

A. I gave him a quarter of a grain of morphia and 1-150 of a grain of atropine together in one little tablet.

Q. Would that be enough to put him to sleep?

A. No, not under that pain. A patient under that amount of pain could take a grain of morphine. It depends on the patient, of course, I will explain. Some patients will take more than others.

Q. After that, do you recall when he went out walking, or was taken out walking by some of the boys?

A. Yes, sir. He was walked on the floor. He became drowsy; and I am not an expert on electrical burns. I will explain this, that I have asked men when they have had practical experience with electric burns, and they say invariably the victim will become drowsy without any opiates.

Q. That is because of the extreme shock, isn't it?

A. It is because of the extreme shock. It will happen in any shock, whether it is an electrical shock or any other shock.

Q. When nature starts to relax or recover itself, it produces that drowsiness? Is that it?

A. Yes, sir.

Q. Now, it was just to overcome that, not to overcome the effect of the morphine or the atropine you used, or the medicine, that he was walked, was it?

A. I couldn't state as to that positively. The boy

was getting a little drowsy, and I told the boys "Don't let him go to sleep now. Let us send him up home when he gets comfortable and relaxed," because I had done all I could.

Q. How long would it take him to recover from that quarter of a grain of morphine at that time?

A. With that amount of pain that he was suffering, I don't suppose it would last an hour, or an hour and a half; possibly two hours. Of course, we cannot always tell.

Q. No, I understand.

A. I wish to explain to the jury, as a physician, we cannot always tell the effect a dose is going to have on a patient.

Q. You have to take the subjective symptom of the patient himself?

A. Yes, sir. The same dose will affect different persons differently.

Q. Now, after his muscles were rubbed straight, what was done with him, do you know?

A. He was walked around. The muscles were not rubbed straight for two hours there. Shortly after that he was taken out doors in the fresh air, and walked around, and I didn't see him after that.

Q. Did you order him taken out and walked out in the fresh air, or did the boys do that?

A. No, I did not. I told them to walk him on the floor in the store.

Q. That wouldn't hurt him any, would it, to walk him in the fresh air?

A. I don't see any reason why it should. To the best of my judgment, it would be of benefit.

Q. So while you didn't order it, you would approve of it, would you?

A. I most certainly would.

Q. Now, you saw his arm as he exhibited it here yesterday, and that hand, did you?

A. Yes, sir.

Q. How long have you been practicing, Dr. Walsh?

A. Ten years this month.

Q. Did you notice the portion of his hand that they claim was paralyzed or dead?

A. Yes, sir.

Q. Now, from your experience with the human hand, and your knowledge of its anatomy, and your knowledge of how men use their hand about their work, isn't it true that those two fingers are very weak anyway, and that the greater strength of the hand is in the thumb and fore finger and the middle finger?

A. Yes.

Q. Of course, these others have strength in them. There is no doubt about that?

A. They have some.

Q. From the observation of his arm, what percentage, or what degree of destruction, or loss of efficiency, would you think, in your judgment, there was there?

A. I wouldn't be able to answer that question un-

til I had examined the hand, and had watched Johnnie for a long time, to see what degree of efficiency there was.

Q. You would have to make close observation for a long period to do that?

A. I would have to make close observation. I couldn't answer definitely at all.

Q. With these different nerves and tendons and muscles that control the action of the hand, there is pretty delicate machinery in there?

A. Yes, if they are destroyed, there is no way of telling except by observation and watching him.

(Recess until 2 P. M.)

Q. Dr. Walsh, from your observation of injuries, serious injuries to the arm, have you seen cases where the ulna was removed, or do you know of any?

A. I know of them, yes.

Q. Well, what has been your observation as a physician as to gaining strength as time goes by? Does the arm get stronger or not?

A. The arm will get stronger providing the muscles are not too badly injured, or the nerves.

Q. And from the fact that he can operate that part of the hand, what would be your opinion—would his hand get stronger or not?

A. His hand should get stronger, and he should get more use of the hand in time.

#### Cross-Examination.

Questions by Mr. RICHARDSON:

Doctor, that would depend altogether upon the

muscles that were left, or tendons that were left in the injured hand, wouldn't it?

A. Yes, it would.

Q. And the nerves?

A. And the nerves.

Q. If there weren't any tendons or muscles left, on account of an operation in removing the ulna, the portions of the ulna and the nerves and the tendons were destroyed, then there wouldn't be any recovery of any strength?

A. No to speak of, no.

Q. Now, Doctor, on your direct examination you stated, I believe, that the boy was brought to the store?

A. Yes.

Q. Now, in what capacity were you working for Mr. Betts at that time?

A. I was manager of the store.

Q. You were manager of the store?

A. Yes.

Q. And also treated the employees in case of injury?

A. Yes.

Q. But you had charge—your main business was you had charge of the store?

A. Yes, I had charge of the store.

Q. You ran the store? That was your business?

A. Yes. It was my duty to always go when I could.

Q. You are at present in the employ of Mr. Betts

and the Cornucopia Mines Company, aren't you, Doctor?

A. I am.

Mr. SMITH: The Cornucopia Mines Company is not a party to this case. I have noticed counsel on two or three occasions put that question in that way. Now, whether he is in the employ of the Cornucopia Mines Company is wholly immaterial, because it is not a party to this case, and it was stated distinctly when the case started. It is against the receiver of the mining company—nobody else. Now, I have no objection to his asking him or any of our men in whose employ they are, nor who is paying them, nor what they are getting, nor anything that is pertinent to the case. But to put the question whether he is in the employ of Mr. Betts and the Cornucopia Mines Company is prejudicial, in that it is not in accordance with the statement as to whom he was suing in this case.

COURT: This action is against the receiver.

Mr. RICHARDSON: This action is against the receiver. That is true—that part of it. But at the same time I would just ask, in order to see whether or not the witness is working for Mr. Betts, and see what capacity Mr. Betts is in now.

Q. Is Mr. Betts the manager now of the new company, Mr. Walsh?

A. I don't know. I think he is.

Q. Well, he is working there?

A. He is working there.

Q. You take orders from Mr. Betts, don't you?

A. I do, yes.

Q. Now, you are at present taking orders from Mr. Betts, aren't you?

A. Yes, sir.

Q. You are in his employ?

A. Yes, sir.

Q. And you were in the employ of Mr. Betts on or about the 28th day of last July, weren't you, Doctor?

A. Yes, sir, I believe so.

Q. Now, when the boy was brought to the store after receiving this injury, he suffered a great deal, didn't he, Doctor?

A. Apparently he suffered a great deal, yes.

Q. The looks of his face and the indications that he gave, you thought he was enduring suffering and great pain?

A. He was suffering considerable pain. I couldn't say how much.

Q. And he wanted you to give him something to stop the pain, didn't he, Doctor?

A. He asked me frequently to give him something to stop the pain.

Q. And that was one reason why you administered an anaesthetic?

A. No, not entirely, because I waited a long time before I gave him anything.

Q. But he was begging for it?

A. He was begging for it.

Q. You never saw the injured hand after he left

that day, did you, Doctor?

A. Not until yesterday, no.

Q. Now, if the doctor who treated and amputated that right hand, and treated the left hand, and performed the operation, if he stated there was a burn down through the hand, the palm of the hand, a good deal larger than a lead pencil, and which was burned and almost burned this finger off, and about through the hand in that direction at least half an inch deep, if that should be the fact that his hand was burned in that way, what, in your opinion, would have caused that deep cut the size of, or a little larger than a pencil?

A. I can only state this, that the burn was not there when I took care of the hand, in the right hand on the palm.

Q. Well, now, you never saw the hand only at that one time?

A. At that one time.

Q. Don't you think, Doctor, that the doctor who amputated the hand and treated the boy would be in a better position to know just exactly how the hand was injured than you would? Some excitement at the time you treated the boy at the mine, was there not, Doctor?

A. Yes, I treated him for minor ailments at the mine.

Q. At the time he received this accident, wasn't there considerable excitement when you had him in the store?

A. No, because I turned almost every one out of the store, and locked the store, so there wasn't more than half a dozen in the store.

Q. You telephoned, didn't you, Doctor, to Mrs. Bisher, to have a doctor at the house as soon as he arrived?

A. After I finished with him, all I could do with him, I telephoned to Mrs. Bisher that I was sending him down in the automobile.

Q. You appreciated that it was a rather dangerous injury, didn't you, Doctor?

A. I didn't know how dangerous, and no one could have told at that time how dangerous.

Q. And you anticipated that it was serious, or you believed at that time that it was a serious injury, didn't you, Doctor, and you were taking every necessary precaution to protect the life of the boy?

A. Yes, sir.

Q. And that was one reason why you telephoned to Mrs. Bisher to have a physician there as soon as the boy could be taken home?

A. Yes, that was one reason, for I didn't know what would result.

Q. Now, don't you think, Doctor, if the doctor who performed the operation and treated the boy for several months in the hospital here in Portland, who amputated the right hand, and who treated and performed the surgical work on the left arm and hand, if he should testify that the injury was as I have stated to you, would you think then that you were mis-

taken about where the burn was on the right hand?

A. I could not possibly have been mistaken about the burn across the palm of the right hand, because when I treated the hand, the burn across the palm was not there, because we rubbed the right hand over the palm.

(Witness excused.)

C. A. BUXTON, a witness called on behalf of the defendant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SMITH:

What is your age, Mr. Buxton?

A. 35.

Q. What is your occupation?

A. Electrician.

Q. How long have you been an electrician?

A. Well, I have been an electrician for six or seven years, but I have been at the business for about 11 years. I consider myself as being an electrician for the last six or seven years.

Q. Yet you have been following it more or less for 11 years, have you?

A. I have put in 11 years actual time at the business.

Q. Where have you followed it, and what have you done?

A. I followed it at the start in Iowa—Ottumwa, Iowa, for the Iowa Bell Telephone Company, for a

short time, and I got canned. Then I went back to them. They hired me back again, and worked for them there quite awhile again. And then I got a chance of a little better job, and I went working for John Morrell Packing Company of Ottumwa, Iowa.

Q. What did you do there? Was it connected with electricity?

A. Altogether electricity. I went to work there as a lineman, and then I assumed the position as assistant electrician.

Q. Where?

A. At Ottumwa, Iowa, for John Morrell & Company. I was around about their establishment.

Q. What position next did you get, and where?

A. The next that I got in the capacity of electrical work was in Spokane, Washington.

Q. How long were you there?

A. I was there two years; just better than two years.

Q. Working for whom?

A. On the start I worked for the Pacific States Telephone Company for a little while, and then I worked for the A. D. T. and for the Western Union. Then I went to work for the Water Power—Washington Water Power Company.

Q. That is one of the largest electrical companies in the Inland Empire, isn't it?

A. I believe—I am satisfied to say that it is the largest.

Q. Where did you work in the Washington Water

Power's works?

A. It was principally on construction.

Q. Outside construction?

A. Yes, sir.

Q. Did you ever have anything to do with the construction of their system from Postfalls, Idaho, over?

A. Not exactly from Postfalls. When I started to work for them, I went out as we call him straw—I went to work as straw boss out in the Big Bend, or rather out beyond Medical Lake, and they were building a transmission line, 60,000 volt line, from Medical Lake to Pawhaw, or a little town just below there—I forget the termination. But anyway it was 110 miles that we built there in the summer. And then in the fall we was transferred up into the Coeur d' Alenes, and we put in the winter there building from Wallace—Wallace sub-station, that is, up the canyon above Wallace and back down the canyon. We went to the upper end, on account of working in as little snow as we could.

Q. Is that the line that furnishes light and power to the mines in that country?

A. That is the line that furnishes power to manipulate the mines in the Coeur d' Alene district.

Q. Sullivan, Last Chance, and Empire, and all those big mines up there?

A. Yes, sir.

Q. You say you built that from Wallace down—

A. Built a parallel line with the old one. They al-

ready had a 60,000 volt line there, built on what they call the triangle frame—framework. The framework was on a triangle, and I don't recall the exact distance now. But the line that we built was seven-foot spacing.

Q. Now, where did you work after leaving Spokane?

A. After leaving the Washington Water Power Company?

Q. Yes. That wasn't Washington Power line out to Medical Lake?

A. Yes, sir.

Q. That is the one that operates that electric road now, isn't it?

A. I don't know just exactly how they use it. They get juice out that way for to run this electrical road, yes, very true.

Q. After you left Spokane, where did you go?

A. Well, when I left the Water Power, do I understand the question?

Q. Yes, after you left the Washington Water Power Company, where did you go?

A. I went to work for Mr. R. M. Betts.

Q. Down here at Cornucopia?

A. Yes, sir.

Q. And been there ever since?

A. Yes, sir.

Q. For six years?

A. No, sir.

Q. How long?

A. I have been with Mr. Betts for four years; almost four years.

Q. Now, when you worked for Mr. Betts, what have you done there in the way of electrical work?

A. I have done—well, what have I done is the question?

Q. Just in a general way.

A. Yes, sir.

Q. Are you acquainted with this line?

A. Yes, sir. I am acquainted with everything pertaining to the Cornucopia Mines Company electrical system.

Q. From the generation of the electricity to its use?

A. Yes, sir.

Q. Do they run the stamp mills with it?

A. Yes, sir.

Q. Free milling is it?

A. They call it free milling ore.

Q. Now, in the course of your experience, have you done outside line work, Mr. Buxton?

A. Yes, sir. Yes, for the Cornucopia Mines Company. The first summer that I was there, as soon as I could get out, why I took and rebuilt the line from one end to the other, and put it in first-class shape, I will say; and I can have my statement backed up—

Q. Just tell us what you did?

A. Yes. In the first place, I went over the line, and dug out the poles, that is, dug around them and sounded them, would stick a bar into them, or chop

into them, or drive the pick into them, or something to that effect, to see whether they were sound or not, and dig around them in a way so that I could straighten them up, because there was scarcely a pole on the line but that needed some straightening in one way or another. And during the course of this time, this here line was on glass insulators, like you see there, that green glass insulator, tied on the side, and tied with heavy copper, the same as the line, and when I had to straighten up the poles, I had to untie it; and I didn't like that kind of a tie, nor that kind of material for to tie with, so I took and put on a new tie. I used a No. 10 iron, and put on what we call a combination, long distance, standard copper tie, just so as to get more of a cinch on the wire, without so much chance of burning wire, you know, twisting it too much so as to burn it every time.

Q. You are acquainted with the standard sized arm, are you not?

A. Oh, yes.

Q. Is this arm here, this Mutual Exhibit B-1, standard size or not?

A. That is what we call a standard arm, yes.

Q. And the distances between the pegs—are those the ordinary and customary distances?

A. Yes, sir, they are.

Q. As a lineman, you have worked on this identical line, haven't you?

A. I have worked every foot over it, from one end to the other, of that line, the first summer I was there.

And since I have been there, I have worked on it in different places.

Q. From the distance that these pegs are apart, from center to center, the two outer ones, and also from the outer end one to the third one, either way, will you tell the jury whether that is a safe distance, or whether it is a cramped distance, or what?

A. It is not a safe distance, and it is not a cramped distance. The reason that makes us safe when we are on a pole, is because we know that we are in danger whenever we are on a pole, where there is electrical current, we know that it is dangerous. If we didn't know it was dangerous, we would soon get into it. So for that reason we always term it dangerous working with electric currents.

Q. In any working with electricity, it is dangerous work in its nature, isn't it?

A. Yes.

Q. I am talking about the distance it is when you can lift one and put it over, is 30 inches a good space to work in?

A. It is not cramped at all. It is a good space. There is nobody asks for more that I know of.

Q. That is as much as you ever heard given to a man, isn't it?

A. Well, I don't know as I ever heard of more or less, or anything different being asked for.

Q. Anyway, it is plenty of room in there when they take them and push them apart?

A. Yes, sir, there is no occasion for a short circuit.

A man can watch himself so he will get along without any danger.

Q. From your experience as a lineman, will you state—there wires were uncovered over there, weren't they, uninsulated?

A. Yes, sir.

Q. No weather insulation?

A. No weather insulation. All the insulation there was, was the glass on the pin.

Q. That is the insulator to keep them off the wood? Is that it?

A. Yes, that is it.

Q. To keep them from growling in damp weather?

A. Yes, sir.

Q. Will you state to the jury whether that bare wire is a safe way of handling the current through it, or whether it should have weather insulation? Which do you regard the safer, and why?

A. I regard the bare the safest of the two, because a man knows what he has got. He is not going to take a chance on some insulation that he don't know whether it is impoverished through weather, or through making a tie upon it, being cut or anything of the kind. He is not taking any chances on that.

Q. What you call weather insulation is not insulation against a shock then, is it?

A. Why, not at all. A man don't consider it, when he is working on a line carrying 2300 volts, insulation for protection.

Q. Something was said this morning about if one of these wires should drop to the street, and have weather insulation,—some question was asked as to whether it would protect the public. Would it?

A. Why, not at all. One evening in Ottumwa, Iowa, there was a 2300 volt wire fell down on the sidewalk, and the sidewalk was wet, and right in front of a cigar store, and I came out and went down the street, and after I had just got out, along comes another man, and he fell on the sidewalk right there. He got a shock, and he fell right behind me.

Q. Weather insulated, was it?

A. Weather insulated wire, yes, sir.

Q. Then that weather insulation is not a protection against shock at all?

A. It is not considered a protection, and I wouldn't take it as protection.

Q. Now, do you know of any transmission high voltage wire, across country, that is insulated to protect against shock?

A. No, sir, I do not.

Q. How are they up around Spokane there, those 60,000 volt wires, that you spoke of, are they bare, or not?

A. Oh, yes, sir, they are positively bare.

Q. Do you know of any 2300 volt wires up in there?

Mr. RICHARDSON: I don't object to that, but I object to 60,000.

Q. Do you know of any 2300 volt wires up there,

transmission lines?

A. Yes, sir. Through the Big Bend country, there were different short lines of 2300 that was there in the country, that was from our big sub-stations. We step it down from 60,000 to 2300 for transmitting around for power to mills. They have flour mills out there, and I know of one that I will say now that was bare.

Q. 2300, was it?

A. Yes, sir, 2300. But the name of the place I cannot recall it just now. May I ask Mr. Betts what is the name of the place just outside of Spokane, west, Mr. Betts?

Mr. BETTS: Davenport?

A. Beyond Davenport.

Mr. BETTS: Wilbur?

A. No, not Wilbur. It is right in there.

Q. Well, it is around in that vicinity of Davenport and Sprague?

A. It is beyond Sprague. Well, anyway, I can go up into the Coeur d' Alenes. There is different places there where there is short lines that is bare, of 2300 volts.

Q. Now, isn't it true that in those countries the greater part of the cross country lines that carry 2300 volts, are bare?

A. Yes, sir, the greater part of them are bare.

Q. Now, did you hear that testimony this morning or yesterday about the different alleged safety appliances that a man should have?

A. Yes, sir.

Q. About these rubber gloves?

A. Yes, sir.

Q. Did you ever hear of a man using rubber gloves in a place like this was, the middle of July, or the latter part?

A. No, I would say I never did hear at all of it, and I positively never saw it.

Q. Would you work at that work in the latter part of July, in that section of the country up there, that arid or semi-arid belt, would you work on this putting in of insulators with rubber gloves?

A. No, sir, they could not. It would take more than a small raise in salary for me to be bothered with them, and suffer the heat that you would get off them up in that country at that time of the year, off rubber gloves.

Q. Make your hands sweaty, would they?

A. Why they would get sore. They would not only sweat, but they would be so tender that they would be sore with rubber gloves.

Q. In climbing poles, and handling around these cross-arms, any danger of a little splinter tearing the glove and destroying its efficiency?

A. There is all the danger that you can imagine, because these are what we call hard sticks, is our poles. They are tamarack and red fir, and any one will know that they are very splintery, and these here splinters, they are most like glass. There would be all the danger in the world of them being punctured,

and in case of a small puncture like that, where your hands are sweating so, it would be really dangerous, because if you should have a puncture of that kind, and get hold of the other side, with his two wires or one wire in the ground, or anything of the kind, it would be positively, if you would get onto that puncture, dangerous.

Q. Now, would you consider rubber gloves a safety protection up in work of this kind, or would they be necessary at all at that time of the year?

A. I would say that they would not be necessary. And it is like this: If a man had a job there that he considered a little bit close, something like that, there would be one point of protection—that would be one point of protection.

Q. That is where he is liable to catch two wires by the hand—something of that kind?

A. Yes, sir.

Q. Where he has lots of room in there, there is no use of it?

A. In that kind of construction, a man don't want them that I know of.

Q. How about this body protection, this sow-belly? Do they use that on that kind of work?

A. They never do on that kind of work. I have seen protectors that they have used, but I never saw one used on that kind of line. I never used a protector myself.

Q. They use that more where there are lots of wires together, and they have to reach over two or

three to reach a third one?

A. Yes, sir. Or where there is more than one cross-arm on a pole, or where a man will be standing like this, and he will be standing astraddle of the wire, he will have his sow-belly in here so he can work on the other.

Q. So up here there was only one cross-arm on the pole, wasn't there?

A. Yes, sir.

Q. There was no great number of wires? Three was all there was, wasn't it?

A. Yes, sir.

Q. Do you know where that telephone wire is set?

A. Yes, sir.

Q. How far below the arm is it?

A. It is about seven feet.

Q. You never measured it, did you, Mr. Buxton?

A. I never measured it myself, but to see a man on there, I don't believe that he could stand in contact with the telephone wire and reach the other wire. I wouldn't say, but I don't think that he could.

Q. Now, with this class and character of work, would it require him to lean across one wire to reach the other, and would a body protector be of any use to him there at all?

A. A man would not do it, because it is like this: Now, then, we will say this cross-arm is now mounted on a pole. We will say that the pole is here, and that there is a wire out there, and one here, one here, and they are all tied in, and if a man wanted to do

work on this one, and he didn't deem it necessary for to move that one out, he would get right in here on the face of the pole. This is the face of the pole. Here is the pole back here, you see. Here is the cross-arm on the face. He would put his safety around, and then he would swing out under. Of course he would be something like this, and work on this. Of course he would be in a very slanting position, we will say something like that, and here he would do his work.

Q. So that instead of laying down on the wires, or leaning over them, he would throw himself out below the wires?

A. Yes, sir.

Q. And avoid all danger?

A. Yes, sir.

Q. What is the highest—what is the hottest wire you ever handled bare-handed?

A. 6600.

Q. Did you have that more than once, frequently or not?

Q. I have handled it several times this last winter.

Q. Is that considered as dangerous as a 2300?

A. It is considered more dangerous, yes, sir.

Q. How long have you been up there on this line?

A. I have been at Cornucopia little less than four years, not quite four years yet.

Q. During your whole time there, was there ever a man hurt on this line outside of this boy?

A. No, sir. No, sir, there never was a man that got anything that ever called my attention to.

Q. Did you know that day, or did you know that this boy was up on those poles?

A. No, sir, I didn't know that he ever was on the poles. So far as my knowing, I don't know that he got burned on the pole only from what—

Q. Just what they have told you?

A. What they have told me.

Q. Of course you believe it?

A. Yes, sir, there is no doubt about it.

Q. You didn't know he was professing to go up those poles?

A. No, sir. I didn't know he had any intentions of going up the poles.

Q. For these purposes?

A. For these purposes.

Q. Did you ever give him a pair of climbers?

A. I give him the privilege of a pair of climbers and insisted he should take them.

Q. What for?

A. So in case Harry Harbert got hung up—our lineman—Johnnie would be there to render the same assistance that Harry did to Johnnie.

Q. You knew that he could climb poles, did you, when you hired him?

A. That is why I hired him; because when Johnnie asked me for the job, it was down town, and Johnnie was working for Mr. Betts at the time on the hill, and when Johnnie spoke to me, I says, "Yes, Johnnie, I

thought of you, you being able to climb, why, there will be a chance for you, and" I says, "Have you got a pair of hooks?" He says, "Yes." "Well," I says, "I have got a pair down there that you can use, but the probabilities are that you would rather use your own rather than use strange hooks, and I would like for you to have a pair along with you, so that if anything happens to Harry, you will be able to get up and down the stick, and you had better have your own hooks," meaning that if anything happened to Harry—Harry Harbert, our lineman—if he should get burned or hung up, as we call it, why Johnnie would be there, would have hooks, so that he could get up to help him.

Q. Did you know that Johnnie had ever tried to tie any wires on those insulators?

A. No, sir.

Q. You didn't know it at the time, did you?

A. No, sir.

Q. Didn't hire him for that purpose?

A. No, sir.

Q. What did you hire him for?

A. I hired him to do ground work as a helper, and it was understood that that was what he was for.

Q. Now, did you ever instruct him—you heard his testimony about your showing him how to make a tie?

A. Yes, sir.

Q. Did that ever happen, Mr. Buxton?

A. Why I never did show Johnnie. I remember

of showing Harry how to make the tie, and if Johnnie, why if he was there and asked any questions, I have no doubt but what I answered them.

Q. You were always glad to inform him if he wanted to know anything?

A. Always; because I never know anything so well as after I have told somebody else.

Q. So that if he did get any talk from you, it was just as a matter of information? Was that it?

A. Yes, sir.

Q. You were not instructing him about any duty then?

A. Not that he had to perform.

Q. And you don't remember of ever having done that, do you?

A. I don't remember, no, sir.

Q. Do you remember positively of instructing Harry how to tie those wires?

Mr. RICHARDSON: Now, may it please the Court, this is the first time I have made an objection, but Counsel has been leading his witnesses until it is kind of nettling. He is putting words in their mouths.

COURT: You may proceed with your examination.

Q. Now, after Johnnie was hurt, where did you first see him, Mr. Buxton?

A. In the store at Cornucopia.

Q. All you know about the injury is what was told you? You don't know anything of it? You didn't see it yourself, did you?

A. All that I know of the injury is what I saw and what was told me there.

Q. What were they doing?

A. They explained to me that he was on the pole and got burned.

Q. What was being done at the store when you saw him?

A. They were massaging his arms. They had his sleeve rolled up, or his arms was bare anyway—I don't remember just how his sleeves were; but anyway his arms were bare—and they were rubbing them any trying to work his fingers. At that time when I got there, his fingers were cramped very firm, and there was no chance to move them, but they were rubbing on his arms, and his arms here was all knots. His muscles was just drawn up into knots.

Q. Now, after that was done, and there in the store, did he seem to be conscious of what was going on—know things did he?

A. Apparently. Whenever we spoke to him, why, he answered, and we carried on, you might say, a disjointed conversation. I don't remember of the boy saying anything at random.

Q. Well, did he talk to you at all?

A. Yes, sir. When I came into the store, Johnnie says to me, he says, "Well, Buck, she is a hot one." I says, "Yes, Johnnie, she is hot dope; any time you get tangled up with 2300, you have got hot stuff." And it went on, and just that is all that was said just then. But anyway, Johnnie says, "Well, Buck," he

says, "it was all my own fault." I says, "Never mind, Johnnie. It can't be helped."

Q. Now, will you please tell the jury what his duties for which you hired him required him to do?

A. He was required for to go along on the ground, and to take wire along, and if necessary, to cut it up into tie wires of the proper length, and carry these insulators. The insulators were at the store, and he was to carry these down onto the line, and distribute them along the poles. And when Harbert was doing his changing, he was to send these tie wires and these insulators up onto the pole by a rope, by putting them into a sack, or tying them onto the rope, or any way that was convenient for them to get them up there on this rope.

Q. Harbert was furnished with this rope, was he, to let down and pull up?

A. Harbert had what we call a hand line, and had it with him. It was there—I saw it near the pole afterwards; and they had a sack there that I saw afterwards. I went and got pins out of the sack. There were some locust pins in the sack, and I went and got them out of the sack they had along with them.

Q. You say you expected him to cut off tie wires?

A. Yes, sir.

Q. From a long wire, was it, or what?

A. They generally had a coil of wire. There was some wire along there.

Q. What would he use to cut off these tie wires with?

A. Pliers. He had a pair of pliers, six inch, as I remember it, that was shiny, nickel-plated. They are not a lineman's pliers exactly, but in his kit I saw a pair of shiny pliers, as I remember it.

Q. Where is the cutting device on those pliers, what part?

A. Why, right in the shoulder, right back in here. And then here is a sort of an opening here, and then here out further here is a plier part, where they come together, and then right in here was the cutting apparatus.

Q. Just throw a wire in there and shut them together?

A. Yes, sir.

Q. Now, was there any work that Johnnie was required to do there, or that you knew he was doing, that required any rubber gloves, or any wrapped or insulated pliers, or any sow-belly, or anything of that kind?

A. There was nothing that I knew of that he was doing that would require anything of the kind, and if I had suggested that he have rubber gloves or anything of the kind, why, no doubt in the world but what he would have turned it down.

Q. Well, now, about the talk that he claimed that was given, I believe,—oh, yes, did you ever tell Harbert to use him on the line, or anything of that kind?

A. No, sir.

Q. Did you ever tell him to obey whatever Harbert said, outside of just this ground-work?

A. No, sir, I never told him to pay any attention to Harbert in any way. I just told him he was to help Harbert. And every man that does ground-work, or is ever hired, or ever works around the line, they soon learn the terms of what ground work means.

Q. Had he worked there before?

A. Not on the line; but the year before I made some taps up in the mill, and Johnnie helped me, out of this 2300. And we worked between this 2300 and some light wires, on a scaffold. The light wires was right behind us carrying 110, and I cautioned him to be very cautious to guard them, too, as if he should touch one of them and me, it would be no better than touching the two at 2300, and I cautioned him very cautiously for to not touch me while I was busy there.

Q. Now, there is something said in the complaint here to the effect that you didn't furnish him any ladders out there? Did you ever heard of ladders being used out on a piece of work like that?

A. Never on a transmission line, no, sir.

Q. The boys climb the poles, don't they, with these climbers?

A. Those climbers, yes, sir. And I suggested, Johnnie have a pair of climbers along with him.

Q. Now, you know, of course, that a man has to have double contact, or double touch somewhere to get a shock?

A. Yes, sir.

Q. You regard it as a safe method of work for a

man to work lifting this 2300 volt wire back and forth, if he doesn't touch any other wire?

A. It is positively safe under the conditions of the weather and general conditions at this time.

Q. Is there any possible duty that you can think of, or ever heard of, that Johnnie would be discharging if he got against both of the wires at the same time—was there any duty that required him to do it?

A. No, sir. If he did it would be done thoughtlessly, not at the discharge of his duties.

Q. Now, he was always a good working boy in there, wasn't he?

A. Yes, sir. Everybody liked him.

Q. He seemed to take an interest in his work, and tried to learn as he went along?

A. Everything that Johnnie undertook to do, he took an interest in it, and tried to do better.

#### Cross-Examination.

Questions by Mr. RICHARDSON:

Mr. Buxton, you are at present in the employ or under orders of Mr. Betts, aren't you?

A. Yes, sir.

Q. And you have been since last July, the 28th?

A. Yes, sir.

Q. Do you know why Mr. Mills sent Johnnie down to you to go to work on the line?

A. Yes, sir.

Q. Why?

A. I asked Mr. Mills for Johnnie, if I could have

him; and Mr. Mills was his foreman; and after Johnnie speaking to me about this, I saw Mr. Mills on the hill—that is up at the mine—and asked him if I could have Johnnie to work on the line, and he told me yes. So when I sent for Johnnie, I guess Mr. Mills sent him down. Anyway he came down after I sent for him.

Q. Now, you told Johnnie he was to help Harry Harbert, didn't you?

A. Yes, sir.

Q. And he would carry thing along, and send them up, and do what Harry told him to do?

A. I told him to help Harry Harbert. I didn't tell him that he was to do as Harry told him to. Johnnie understood that I was boss—if you want to term it that way. He was working for me.

Q. You told him distinctly that he was to go there and help Harry, didn't you, Mr. Buxton?

A. Yes, sir, I told him to go and help Harry.

Q. And that Harry would tell him what he wanted him to do, if he wanted some insulators, he would have him send up insulators, if he wanted tie wire, he would have him send up tie wire?

A. Yes, sir.

Q. Johnnie was an obedient boy, wasn't he, Mr. Buxton?

A. Yes, sir.

Q. He usually did what you told him to do, didn't he?

A. Yes, sir, he tried to.

Q. He was well liked, wasn't he?

A. Yes, sir.

Q. He did the things that you ordered him to do?

A. Yes, sir.

Q. He wasn't disobedient, was he?

A. No, sir.

Q. Now, you were speaking of your work as a lineman. Have you ever been known as a lineman—electrical worker known as a lineman, that is a distinct business of itself, isn't it, Mr. Buxton?

A. Yes, sir, distinct.

Q. Now, have you ever allied yourself with that class of electrical workers so you would be known as an electric lineman?

A. Yes, sir.

Q. You have?

A. Yes, sir. I belong to the new union in Spokane—703.

Q. You belong to the union in Spokane?

A. Yes, sir, 703. Then it was a joint union, the inside and linemen, both had the same union, or both belonged to the same number. But since that it has been split.

Q. Now I will ask you to examine, Mr. Buxton, this piece of copper wire that I now hand you, and ask you what that is?

A. It is weather proof copper wire.

Q. What size is that copper wire?

A. I would say No. 4, looking at it from my general observation, I would say it was size No. 4.

Q. Size No. 4. Was that about the size that was used on the power line of the Cornucopia Mines Company?

A. That there is smaller.

Q. That is a little smaller?

A. Yes, sir.

Q. Yours was a size larger?

A. Yes, considerable larger. Our transmission line was larger than that lead pencil.

Q. A little larger than that lead pencil?

A. Yes, sir.

Q. Now, Mr. Buxton, what is the object of that insulation? You have seen a lot of it haven't you?

A. A lot of it, yes.

Q. You have seen it strung for miles, haven't you, Mr. Buxton?

A. Yes, sir.

Q. Now, it is more expensive than the naked wire, isn't it, Mr. Buxton?

A. More expensive per foot, yes, sir.

Q. Yes, on account of you pay just as much for the weight of that as you would for the weight of solid copper?

A. Yes, sir.

Q. And it is practically twice as heavy isn't it, as the naked copper wire itself.

A. That wire there is almost, yes.

Q. And it would cost approximately twice as much as an insulated wire, wouldn't it, Mr. Buxton?

A. I would judge almost.

Q. Practically. Now, what is the object in using it? You never saw any of these wires carrying a voltage of 2300 volts in the Cities of Spokane or Portland, or any other city, naked, uninsulated, did you, Mr. Buxton?

A. I wouldn't say that I did.

Q. Now, what is the object of insulation?

A. A matter of protection.

Q. A matter of protection?

A. Yes, sir.

Q. Now, supposing, Mr. Buxton, that on the 28th day of July, 1912, you would have had an insulated wire, insulated transmission system, all three wires would have been insulated with insulation like that—that is a dry climate, isn't it?

A. You would call it a dry climate at time of the year, yes, sir. It was dry at that time.

Q. And it was dry at this time?

A. I wouldn't say now. It hasn't been dry, but it is probably dry now.

Q. Now, if the plaintiff, Johnnie Bisher, would have come in contact with a wire properly insulated, as this is insulated here, would there have been any accident?

A. As that is insulated there, there wouldn't have been any accident.

Q. If it had been defective, or if it had been broken, or old and worn, or rotten and decayed, it would have been dangerous almost as much as if it was naked wire, wouldn't it?

A. It would have been more so, because they would probably have taken a chance where being naked they wouldn't.

Q. Now, suppose Johnnie had had on rubber gloves that came up to his elbows—you have seen those rubber gloves that linemen use, haven't you?

A. Well, I don't know. I never did see a long pair of rubber gloves.

Q. How long has it been since you worked as a lineman, Mr. Buxton, that is, regular lineman in Spokane? You worked as a lineman in Spokane, did you not?

A. Five years.

Q. And the only work you have done as a lineman since five years has been work that you have done for Mr. Betts at the Cornucopia Mines, near Halfway, Oregon—is that right?

A. Well, I will say the summer before I came to work for Mr. Betts, why, of course, I did considerable work as a lineman—while that was voluntary on my part, but at the same time it was lineman's work, but while I was discharging this here duty, why, I was considered as a lineman.

Q. Now, isn't there another object of insulation, that if a wire is insulated, if it comes in contact with another wire in case of a storm, or if the tie wire should break and it should drop down on the pole, if it is insulated, there is no danger, is there?

A. Yes, there is.

Q. What danger would there be if the insulation

is good insulation? I am speaking of not defective insulation, but I am speaking of insulation.

A. Well, we will understand as good insulation as that there insulation as it stands right now is good insulation for weather proof?

Q. Yes.

A. But in case that it should be wet and drop down onto that cross-arm—

Q. And the cross-arm was wet?

A. And the cross-arm was wet, with 2300 volts, there would be danger of a ground.

Q. There would be danger of a ground?

A. Yes, sir.

Q. Now, what does a lineman wear rubber gloves for?

A. Well, in case that they get cramped into a cramped place, where they don't have room to work, don't have a chance to guard themselves, and it is almost impossible for them to get through without touching one side or the other, or very small chances for them to get through, they will wear rubber gloves.

Q. If they have got rubber gloves on, that is an insulation, isn't it, Mr. Buxton?

A. It is an insulation, yes.

Q. You can take two good rubber gloves and hold two different live wires with them, can't you?

A. It depends on what voltage there is on the wires and how old the rubber gloves are.

Q. Do you know what the test that rubber gloves that linemen work with, what the test is run up to,

what test they are guaranteed or rated up to?

A. No, sir.

Q. Didn't you know that they had a test that each glove that is sold as a lineman's glove bore and was tagged as a test, a certain number of volts?

A. I know that they are, but I don't know what the test is, and furthermore, that there is only while they are perfectly new.

Q. That is when the gloves are in good condition?

A. Yes, sir.

Q. Now, remember, Mr. Buxton, I am asking you about gloves in good condition?

A. Yes, sir.

Q. Gloves will wear out as anything else will wear out, as insulation will wear out?

A. Yes, sir, and rubber as insulation will wear out.

Q. How often do the companies that you have worked for, that had weather insulated copper wires, how often do they change those wires?

A. Well, back east there where I worked, there was a lot of our wires, 4-0 and larger, that was condemned, that we had to tear down.

Q. What was it condemned for?

A. For poor insulation. It was weather proof outside wires. But instead of us tearing it down, we put—I forget how many men, but some men to work on these wires, and painted them with P & B paint, and they passed inspection without any hesitation. They never were noticed after that.

Q. Do you mean that that was a good insulation?

A. I mean that it fixed them up in a way so that the next time that they were inspected, they were not turned down.

Q. You mean that the insulation was good afterwards?

A. No, sir.

Q. In other words, you mean that you deceived the public?

A. It was a matter of deception, yes, sir.

Q. That was done for the purpose of not incurring greater expense?

A. It was for the matter of cutting down expense.

Q. Cutting down expense?

A. Yes, sir.

Q. Now, you don't mean to say that if you had insulated wires over at Cornucopia instead of uninsulated, that it would injure the efficiency of your plant, do you, Mr. Buxton?

A. Yes, sir.

Q. It would injure the efficiency of your plant?

A. Yes, sir.

Q. In what way?

A. It would add resistance to the line; imperceptible, but at the same time, it can be figured out as to what it is.

Q. To what extent—to any practical extent, of practical notice?

A. No, not to practically notice, no, sir.

Q. So that practically, you could operate just as well with insulated wires as you can with uninsulated

wires, couldn't you, Mr. Buxton?

A. Practically the same, yes, sir.

Q. Now, you said that this was a standard gauge cross-arm, did you, Mr. Buxton?

A. Yes, sir.

Q. How do you know that it is a standard gauge cross-arm?

A. Because it is what we used in the Coeur d' Alenes, and through the Big Bend. It is the same thing in this western country. Now, back east we didn't use that same cross-arm.

Q. Now, what did you use back east?

A. We had a seven pin cross-arm.

Q. Seven foot?

A. Seven pin. And our system was Y-connected, and we had a neutral. We had four wires, three phase on one side, and the neutral, and three phase on the other side.

Q. Now, Mr. Buxton, this is bolted through a pole—that is a round pole, isn't it?

A. Yes, sir.

Q. And it is sawed into, and the cross-arm is nailed onto a place that is chipped out of the pole, and bolted onto the pole?

A. It is fastened onto the pole, yes, sir.

Q. How many inches in diameter do you suppose that pole is at the top? Have you ever measured one?

A. Harry Harbert measured this pole, and it measured 32 inches in circumference.

Q. 32 inches?

A. So Mr. Harbert said, yes, sir. I didn't measure it myself.

Q. Now, in making these changes, you stated that if there were two transmission wires carrying a voltage of electricity of 2300 volts on these insulators, and one over here, that whenever you made any repairs on this one, you would move this one over there?

A. Yes, sir.

Q. What did you do that for?

A. For to give room to work on this there. A man could stand almost erect, and work very easily.

Q. Would it be impracticable to place a third wire on the top of the pole? You have seen that done, haven't you?

A. Oh, yes, sir. All our construction the year before I came to work for Mr. Betts our third wire was over the top of the pole.

Q. All of it?

A. Yes, sir.

Q. And left the distance between the top of the pole and the end of the cross arm for the workman to make his repairs?

A. No, it didn't leave any room there at all, because it was not worked on. It was 60,000 stuff, and we didn't work on it.

Q. You didn't work on it?

A. No, sir, not alive.

Q. You didn't work on it alive?

A. No, sir.

Q. Why didn't you?

A. Because nobody wanted to try it.

Q. Too dangerous?

A. Yes, sir.

Q. Do you know why they insulate wires around dwelling houses and places of that kind, Mr. Buxton?

A. Because the voltage is light, and they can insulate them.

Q. They can insulate them?

A. Very practically, yes, sir. Then can use rubber covered.

Q. It is a little expensive, is it?

A. Yes, sir, it is quite expensive, because they have got to use rubber to do it.

Q. But it can be done successfully?

A. On low voltage, yes, sir.

Q. Up to how high voltage?

A. Well, to 500, practically, everything up to 500 they figure safe for insulation.

Q. And with 2300, they use weather proof?

A. Yes, sir.

Q. In practically all cities and towns?

A. Yes, sir, as I understand, from what my experience has been, they do.

Q. Do you know of any other, any system in Oregon, outside of the one in Cornucopia, that uses 2300, a transmission system of 2300 volts, that don't have weather insulation on their transmission lines?

A. I am not acquainted in Oregon. I cannot say that I know of a transmission line of 2300 outside of our own in the State of Oregon, whether it is insu-

lated or not.

Q. You know where Mr. Panter lives, Mr. Buxton?

A. Yes, sir.

Q. How far is that from the power house?

A. We will say it is almost three-quarters.

Q. Three-quarters of a mile?

A. It is less than three-quarters, and it is better than a half mile.

Q. A little more than half a mile?

A. Yes, sir, that is from the old plant. Speaking of the plant that we was running on the 28th day of July last year?

Q. Yes.

A. Yes, sir.

Q. Nearly three-quarters of a mile?

A. Something like that. I cannot say the distance, but it is better than a half, and it is less than three-quarters.

#### Redirect Examination.

Q. How long does weather insulation last, Mr. Buxton?

A. Well, it is not considered, after a year, we will say, it is not considered as insulation any more.

Q. Even for weather purposes?

A. Not even for weather purposes.

Q. How long will weather insulation last in a perfect condition?

A. A short time.

Q. The first rain does it up, doesn't it, for that purpose?

A. A man doesn't want to take any chances on it after it has been out there, after the first rain, we will say.

Q. Now, would it be practicable for any electric light company, operating a cross country transmission line, to keep its wires perfectly insulated with weather insulation? Is it possible for them?

A. It is not possible, and there is no way—there is no law nor anything of the kind that could make them keep it in first-class insulation.

Q. Bankrupt any company to do it, wouldn't it?

A. They would never start at all. Yes, it would break any company.

Q. Counsel brought out something about the wires being insulated on low voltage. Right here this little light wire is perfectly insulated, isn't it? (Referring to wire attached to lamp.)

A. Yes, sir.

Q. How many volts, about? Can you tell by the globe?

A. That there is probably for 110. I don't know just what the test will be on that cord, but that there light is probably 110 volts light.

Q. Can you look at it and see?

A. This here says, marked with lead pencil, 126 volts.

Q. And that is the reason, because of the low voltage is the reason they can put that up in silk, and you

can handle it, isn't it?

A. Yes, sir.

Q. They couldn't do that with 2300 voltage, could they?

A. And that there is more than likely cotton. It don't have to be silk.

Q. About these rubber gloves here that they speak of, about this rubber glove that he brought out—was there any duty that this boy had to perform that would require rubber gloves?

A. No, sir.

Q. Did you offer Harry Harbert rubber gloves, or direct his attention to it when he went to work?

A. No, sir, never thought of it being necessary at all.

Q. And you state this is the only accident that ever happened up there?

A. It is the only accident that ever happened under me—anywhere.

#### Recross Examination.

Q. Mr. Buxton, you said, I believe, in your redirect examination, that you didn't think it was practicable to have this weather insulation?

A. I don't.

Q. Have you ever observed the insulation of electric wires in transmission lines from the sub-stations all over the city?

A. No, sir. I haven't been in here only a day or so, two or three days, and I have not.

Q. Don't you know as a matter of fact that they are all insulated?

A. I believe that they are. I believe they are. I have not noticed them, but I will believe that they are positively, right here under City Ordinance.

Q. Don't you know that they are required to keep them insulated?

A. No, I don't know from my own knowledge; but I understand that they are required to keep them insulated, and while they are required to keep them insulated, they don't do it—they will practice deception, the same as we did back east.

Q. How do you know they don't do it?

A. My experience has showed me so.

Q. Have you read of many accidents in Portland?

A. Yes, sir.

Q. Recently?

A. I cannot say of any real lately; no, I cannot recall.

Q. You know there are hundreds of these lines carrying 2300 volts, in these sub-stations, through the transformers, don't you?

A. Yes, sir, undoubtedly there is hundreds of them.

Q. In a city of this size?

A. In a city of this size.

Mr. SMITH: If the Court please, I have no objection to the examination, but I understood the Court ruled this morning—

COURT: I don't think it is necessary to pursue it.

(Witness excused.)

G. R. LADD, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. SMITH:

Mr. Ladd, what is your first name, please?

A. My name is George Ranse Ladd.

Q. Where do you reside?

A. Cornucopia.

Q. How long have you lived there?

A. I have lived there off and on the major portion of the time since 1900.

Q. What is your occupation, please?

A. Miner, contractor.

Q. Underground worker, underground miner?

A. Underground miner.

Q. Do you know the plaintiff, Johnnie Bisher?

A. Yes, sir.

Q. How long have you known him?

A. I have known him slightly for four or five, maybe six years.

Q. You have known him up there at Cornucopia, haven't you, Mr. Ladd?

A. I have known him at Cornucopia, and also at Pine Valley.

Q. Did you see him the day he was hurt?

A. I did.

Q. Where was he at the time you saw him?

A. When I first saw him he was in the wagon at

the Cornucopia Trading Company's store right in front of the building.

Q. They took him from there in the store, did they?

A. Harry Harbert and Justice McKinnon carried him in.

Q. What did they do with him there?

A. When they first took him in, or first brought him up, there was quite a crowd gathered round, to find out what was the matter. I was among, I was on the outside. I didn't go into the store at first, because there was quite a little crowd gathered in there, and I thought that maybe my room would be worth more than my company.

Q. You afterwards went in a little later?

A. Afterwards they started to clear the store out, and I asked J. P. Walsh if I could be of any assistance, and he told me that the boy's arms were cramped and so on, and that they had to massage his arms.

Q. And you worked there under the doctor, did you?

A. And I might help rub his arms, if I would.

Q. Did you do so?

A. I walked inside, and they had him laying on a counter, and I commenced to rub his arms.

Q. His muscles were knotted at that time, were they, drawn up?

A. Very much in this manner.

Q. Suffering a good deal, wasn't he?

A. Intensely, I should judge.

Q. Now, did you help rub his muscles out, as you call it?

A. I did.

Q. And about this direction?

A. Yes, sir.

Q. About how long did you work at that, Mr. Ladd?

A. I don't know exactly, but I judge it was an hour, or maybe an hour and a half.

Q. Did you see and notice his mental condition at that time? Was his mind clear, or what?

A. His mind seemed to be perfectly clear. At the time that I first went in, he was suffering intensely, so I thought, and he was groaning and screaming. He says, "Oh, God, I can't stand it."

Q. Now, after you had rubbed his muscles out, did it seem to relieve his pain any?

A. He began, as soon as his cramps, or knots in his arms began to come out, he appeared to become easier.

Q. You were there when the doctor gave him this injection, or whatever it was he gave him?

A. I was.

Q. Did you notice his mind after that?

A. I did.

Q. Was he cognizant of what was going on? He recognized you, did he?

A. Yes.

Q. Talked with the boys around there?

A. Yes.

Q. Now, after you started down with him, were you in the automobile in which he rode?

A. I was.

Q. What was his mental condition then?

A. Clear.

Q. Did he appreciate who was around him, and what they were doing?

A. Seemed to.

Q. Did you talk with him any about how he was hurt?

A. I didn't talk directly with him. I didn't ask him any questions, but disconnected conversation—I heard a good deal of disconnected conversation addressed to me and Harbert.

Q. By him?

A. By him.

Q. He was doing the talking, was he?

A. Yes, sir.

Q. Did he talk about how this thing happened?

A. Yes.

Q. What did he say?

A. In the store, while we were in the store, and he was suffering so intensely, at first he didn't say anything except to scream and "My God, I can't stand it. It is killing me," and begged the doctor to give him something to ease the pain. And after his muscles began to relax, why then he told, the first thing was in about probably after half an hour—I had been in there half an hour or so—Buxton came in, Charles Buxton, and Buxton was rather excited too, and he

says—I may not get the words exact, but he says, “Jesus Christ, this is Hell,” or words like that,—some oaths.

Q. Buxton said that, did he?

A. Buxton said that. And he worried, seemed to worry considerable. There was quite a little disconnected conversation, or exclamations uttered by Buxton, and Johnnie had begun to, and then Buxton—I was on the outside of the counter, and rubbing his left arm; Buxton and Harbert were on the inside, and was rubbing his other, rubbing his right arm; Walsh was occasionally taking turns in chafing his hands—and after he began to get easier and become more conscious of everything that was going on, he reassured Buxton, he says, “Don’t worry, Buck. It is not your fault. You ain’t to blame.” And shortly afterwards Harbert asked him, “How did it happen, Johnnie?” Johnnie said, “I was holding one wire,” he says, I was standing up there with my hand on one wire, and I don’t know how I connected with the other.” He says, “I must have got careless.” During the early part of my time there in the store, Doc Walsh give him an injection in his arm. supposedly—I supposed it was morphine. I didn’t ask him what it was, or anything.

Q. All right. He gave him an injection. He has testified what it was.

A. Yes, to relieve the pain a little, and Johnnie kept begging him to give him more to dull this pain—said he couldn’t stand it. Walsh said, “I don’t want to

give him any more than I positively have to," he says, "because it might stop the action of the blood, retard the circulation." He told me, "The only thing that we can do is to try to keep the circulation, restore circulation in these hands."

Q. That is the reason you were rubbing him, was it?

A. That is the reason.

Q. Now, is that all the conversation, about, that you recollect there at the store?

A. After the flesh on his arms and hands began to get soft, and the pain seemed to leave him, he began to get sleepy—very sleepy. He wanted to go to sleep, and Doc Walsh said, "I wouldn't let him go to sleep now. I wouldn't let him go to sleep, because it might retard circulation, have a tendency to stop the circulation, and you had better walk him around in the store; better walk him around, and keep him awake if you can." So we walked him around in the store, and occasionally he kept begging to "let me go to sleep." But as we walked him around, we massaged his arms all the time, and occasionally, of course, when he would get pretty sleepy, we was a little rougher than we would be otherwise, and any sudden twinge of pain would bring him to. It didn't seem very long to me before he began to walk off the effects of this morphine, or whatever he had; and then someone took him outside, but I don't know who it was, whether it was Walsh or Buxton. I think it was Buxton, though, that asked me if I would go down in

the auto with him and take him down. I said, "Yes, anything that I can do."

Q. And you did go down in the auto, did you?

A. I went down in the auto. Meanwhile I went up to my house,—I have a place up there, and lived there for a number of years—I went up to the house, and told my wife I was going down—

Mr. RICHARDSON: That is not material, Mr. Ladd, about what you told anybody.

A. Meanwhile, I think it was Buxton walked Johnnie around the town.

Q. You know of him being walked around the town anyway?

A. Yes. And I came down town again, prepared to go down to the valley; and they said—I think it was Batty, says, "We will be ready to start in a moment." Batty was the man that ran the car. And pretty soon we were ready to start, I got in the machine, and asked where Johnnie was, and they said, "We will pick him up down the line." Him and Harbert went down the road, and somewhere below town, probably half a mile or so, why we picked up, we overtook Harbert and Johnnie, and picked them up, Harry sitting on one side of Johnnie, and I on the other side. And as we rode down, we kept working his arms, and massaging the flesh of his hands and arms here. As soon as we stopped, the hands and arms swelled up again, the skin began to get tight and hard, and the fingers, some of his fingers would begin to turn black.

Q. Now, while you were riding along there, did he make any statement about how this happened, or whose fault it was?

A. He said to Harbert he didn't know how it happened, but he must have got careless; he didn't have anybody to blame but himself, he said. He also says, told Harry Harbert that he owed his life to him; maybe not in exactly those words, but in practically that same thing, "if it hadn't been for you, I would have been a goner."

Q. Words to that effect, was it?

A. Words to that effect.

Q. Now, at the time you rubbed his hands, did you rub his right hand, or did the other boys rub his right hand?

A. Buxton rubbed his right hand, Buxton and Harbert.

### Cross Examination.

Questions by Mr. RICHARDSON:

Mr. Ladd, who were you working for on the 28th of last July?

A. I wasn't working.

Q. You had been working for whom? You had been working for Mr. Betts hadn't you?

A. No, sir.

Q. You had not?

A. No, sir.

Q. Hadn't you ever worked there in the Cornucopia Mines?

A. I have.

Q. Who were you working under?

COURT: I don't think this is cross examination.

Q. You have been in the employ—you have been working over there at the mine, haven't you?

Mr. RICHARDSON: I want to show his relation, your Honor.

A. I have worked there one time about five years ago.

Q. Haven't worked there since?

A. Not for the Cornucopia Mines Company.

Q. Or for anybody else? Who else did you work for?

A. I worked for Colonel W. R. Abercrombie of Spokane, on the Red Mountain.

COURT: I don't think that is necessary.

Mr. RICHARDSON: I wanted to show his relation to the defendant.

A. I will state that for the last four or five years, your Honor, I have been contracting, and I haven't worked but very little for wages.

Q. You have been contracting?

A. Yes, sir.

Q. What kind of business?

A. Mining.

COURT: I don't think that is necessary. It takes this witness a long time to tell what he knows.

Mr. RICHARDSON: I am trying to find out his business, your Honor. I am trying to find out the witness' particular business.

Q. What is your particular business?

A. Mining.

Q. What have you been doing recently?

A. The last few months I have done nothing. The last work that I did was in the Last Chance Mine, Cornucopia, Oregon, leasing.

Q. How long ago?

A. Last October.

Q. Whom does the Last Chance Mine belong to?

COURT: I think that is immaterial.

Mr. RICHARDSON: My object, your Honor, was to show his relationship.

COURT: If you wish to show his interest here you may show that.

Mr. RICHARDSON: That was the object.

Q. The Last Chance Mine is owned by—

COURT: I don't think it is necessary to disclose that fact any further.

Mr. RICHARDSON: Very well.

Q. Now, you stated, Mr. Ladd, that Johnnie was suffering considerably during this time, I believe?

A. It appeared to me that he was.

(Witness excused.)

Mrs. KITTIE B. GRAY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. SMITH:

Your name is Mrs. Katherine Gray?

A. Mrs. Kittie B. Gray.

Q. Where do you reside, Mrs. Gray?

A. Halfway, Oregon.

Q. Do you know Johnnie Bisher, the young boy in this case?

A. Yes, sir.

Q. How long have you known him?

A. I have known of him, but the first time I met him was up at the mine last year, some time in July, I think it was, or August—the first of August. I don't remember.

Q. You have known of the family quite a little while, have you?

A. Yes, sir.

Q. Now, did you visit Johnnie at the hospital in this city?

A. Yes, sir.

Q. About what time, please?

A. It was some time in August.

Q. What was his condition at that time, his mental condition?

A. Clear.

Q. Did you have any talk with him about this injury?

A. Yes, sir.

Q. What did he tell you as to how it happened?

A. He said he didn't know how it happened.

Q. Did he make any statement to you as to who was to blame for it?

A. Yes, sir.

Mr. RICHARDSON: May it please the Court, I believe I will object to counsel leading this witness. I prefer to have him let the witness tell what the conversation was without him suggesting it, your Honor.

COURT: He is only calling attention to that matter, and then he will let her tell it in her own way. The witness can answer whether he made any statement to her.

Q. Did he make any statement to you regarding how this accident occurred?

A. We were talking it over.

Q. What did he say to you?

A. I asked him how it happened, and he said he did not know; he could not tell me how it happened. And I asked him who could have been to blame for it, and he said no one but himself.

Q. About what time of August was that, Mrs. Gray?

A. Well, I really couldn't tell you. I came to Portland the 12th of August to be treated for my hand, and I was here a number of days, and I don't know just what day it was.

#### Cross Examination.

Questions by Mr. RICHARDSON:

Mrs. Gray, your daughter and son in law are working for Mr. Betts, aren't they now?

A. Yes, sir.

(Witness excused.)

ROBERT M. BETTS, a witness called on behalf

of the defendant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SMITH:

Where do you reside, Mr. Betts?

A. At Cornucopia.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. Native born?

A. Yes, sir.

Q. And a resident and citizen and inhabitant of the State of Oregon, are you?

A. Yes, sir.

Q. You are the man who is named as defendant by being receiver of the Cornucopia Mines?

A. Yes, sir.

Q. Mr. Betts, do you remember of Harry Harbert going to work up there on this line, about the time?

A. Yes, I remember when he went to work.

Q. Tell what you did, if anything, in relation to offering him, or telling him of rubber gloves.

A. Why, the change of insulators was contemplated, and about the time that we were ready to put them on, I asked Mr. Harbert if he wanted any rubber gloves, or any protection, and he said no, that he never used rubber gloves. And that is all there was to it.

Q. You know Johnnie Bisher, don't you?

A. Yes, sir.

Q. How long have you known Johnnie?

A. About three years.

Q. Did you know of his working there, or attempting to do anything with this line of work?

A. No, sir.

Q. Now, at the time of this injury, you were operating the mines there, were you?

A. Yes, sir.

Q. In what capacity?

A. As lessee.

Q. I will show you this document, dated the 1st day of November, 1911—

COURT: Is that the 1st day of November? I think the answer says the 9th.

Mr. SMITH: The certificate of acknowledgement is the 9th. The certificate is dated the 1st.

A. It was signed on the 9th.

Q. The certificate is the 9th. I didn't notice that before. This lease dated the 1st day of November, 1911, and acknowledged on the 9th day by Mr. Thomas, the lease being signed by the Cornucopia Mines Company, by Joseph B. Thomas, President, and Robert M. Betts—You signed it?

A. Yes, sir.

Mr. RICHARDSON: May it please the Court, I object to counsel reading that. I want him to finish his question. Then I will make my objection to its admission.

Mr. SMITH: I haven't offered it yet.

Q. The lease being executed by the Cornucopia

Mines Company by Joseph B. Thomas, President, attested by Ina W. Hunter, Secretary, and also signed by you. You are the same person named in this lease?

A. Yes.

Mr. SMITH: We will offer the lease in evidence. I will not try to read the lease until it is admitted, but I will also direct his attention to the recording certificate on the back. You had it recorded, did you?

A. Yes, sir.

Mr. SMITH: We will offer the lease, together with the date of recording, as appears from the endorsement on it.

Mr. RICHARDSON: Now, may it please the Court, I object to that as incompetent, and particularly as immaterial, for the reason that by the records of this Court, it cannot be used as a defense in this action. In this court on the 21st day of December, 1911, and by admissions of the defendant that he is the receiver, this order was entered: "Now, on this 21st day of December, 1911, comes the complainant, The Hamilton Trust Company, by Williams, Wood and Linthicum, its solicitors, and it appearing that respondent, the Cornucopia Mines Company of Oregon, and respondent Valentine Laubenheimer, have been regularly served with the order, to show cause herein, and it appearing that respondent S. W. Holmes has very little interest herein, and that the application for a receiver herein is not resisted by any of said respondents, and the Court having been fully advised in the premises.

It is now hereby ORDERED, ADJUDGED AND DECREED that Robert M. Betts be, and he hereby is appointed receiver of all and singular the real and personal property of the said the Cornucopia Mines Company of Oregon, covered by the mortgage sought to be foreclosed herein, and that said receiver be, and he hereby is, authorized and directed to take immediate possession of all and singular the said real and personal property, wherever situated or found, and to continue the operation of said mining and other property, and every part and portion thereof, as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so. It is further ordered that said Receiver, within the next ten days, file with the clerk of this court, a proper bond," which bond was properly executed and signed. And in connection with that is an affidavit made by Colonel Callahan that it was necessary that the Receiver operate this property, and the Receiver was operating this property on the 28th day of July, 1912, and has made his reports to this court. Judge Bean, your Honor, made these orders, and here is the Judgment Roll.

COURT: This lease was made prior to the time the Receiver was appointed?

Mr. SMITH: Yes. It was made the 1st day of November, 1911, and executed the 9th.

COURT: When was the Receiver appointed?

A. The 21st of December.

Mr. CALLAHAN: The Receiver was appointed December 21, 1911.

Mr. SMITH: The lease was both executed and recorded long prior to that time, when Mr. Betts was not a party to the proceeding.

(Argument.)

COURT: The receiver has reported that he has made certain expenditures, and he has also shown that he has received certain moneys from the mine, so that the expenditure would be set off against what he received. Now, then, were those expenses that he has returned as having expended on account of this mine, were those expenditures incident to keeping up this electric plant and keeping up the expenses touching the running of the plant?

Mr. CALLAHAN: Yes.

Mr. BETTS: We have to run the plant to run the mine.

COURT: Wouldn't that be part of the business as lessee?

Mr. BETTS: Yes.

COURT: Then why did you report that as an expense to the Receiver, to your operation of the mine as Receiver?

Mr. CALLAHAN: The lease requires him to account to the Cornucopia Mines Company and pay them a royalty of ninety per cent of the proceeds.

COURT: I will admit this lease and dispose of the other question afterwards. It might be necessary to

submit that question to the jury to determine whether they were operating under this lease, or under the Receivership.

Mr. SMITH: We will offer the lease in evidence, together with the endorsement of recording.

Mr. RICHARDSON: We will save our exception. Marked "Defendant's Exhibit G."

Mr. SMITH: I presume counsel will agree to waive the reading of the lease at this time. I can read it later.

Q. I will show you this document marked for identification "Defendant's Exhibit A," the one which Johnnie Bisher admits he signed. That is one of the documents you received, is it, Mr. Betts?

A. Yes, sir.

Q. For what period is that a receipt of labor?

A. That is for the month of July.

Mr. SMITH: We will offer in evidence this document, if your Honor please.

COURT: Do you object to that?

Mr. RICHARDSON: May it please the Court, we object to this upon the same grounds that we objected to the other, as being incompetent and irrelevant, as the records of this court show that he was operating that plant at that time as receiver of the Cornucopia Mines Company of Oregon.

COURT: Your objection will be overruled, and you may have your exception.

Marked "Defendant's Exhibit A."

Mr. BOOTHE: What part of this are you offer-

ing?

Mr. SMITH: I am offering the whole document just as it is. It seems to be attached. I do not know what that first paper is. The second paper is the one I am after—the one underneath. I don't care anything about this first top paper, but I don't want to detach it.

Mr. BOOTHE: That has nothing to do with this case.

Mr. RICHARDSON: This says "The Cornucopia Mines Co., of Oregon, to Mills, Bisher, Smith & Mills." "Robert M. Betts, Lessee" stamped in there. No signature, but stamped.

COURT: I understood the boy admitted his signature to that.

Mr. RICHARDSON: He admitted that was his signature, but he didn't admit that there was any "lessee" on there, your Honor. He denies that that was on there when he signed his name.

COURT: The jury heard that.

Mr. SMITH: He didn't deny it was on there. He says he didn't see it.

Q. Now, I will ask you, Mr. Betts, at the time that was signed, if that stamp was on there—"Robert M Betts, Lessee"?

A. Yes, sir.

Q. Why did the boy sign up on the body of that instead of up here?

A. Because there were too many of them to sign on this one line. It is merely a matter of record.

Mr. SMITH: The document down here says "Robert M. Betts, Lessee", instead of the Cornucopia Mines Company, and it is headed "To Mills, Bisher, Smith & Mills, of Cornucopia, Ore. Contract for sacking concentrate & slimes." So many sacks, so much money—carrying it out.

The date is "Received July 15, 1912," and the boy signed up there instead of down here because there wasn't room—thirteen days before the injury.

Q. Now, after you got this lease, Mr. Betts, dated November 1st and recorded the 28th of November, 1911, at 10:30 o'clock, who was in possession of that mine from the first day of November on?

A. I was.

Q. In what capacity?

A. As lessee.

Q. Were you operating it at the time you were appointed Receiver?

A. Yes, sir.

Q. In what capacity were you operating it?

A. As lessee.

Q. You operated until your lease expired, did you?

A. Yes, sir.

Q. As lessee?

A. Yes, sir.

COURT: What is the consideration for the lease, Mr. Smith?

Mr. SMITH: My recollection is it is a royalty. He is to pay so much of the proceeds. Therefore he accounted right along and showed his expenses. Here

are several pages of description of property, "And in consideration of such demise, the said lessee doth covenant and agree with said lessor as follows, to-wit:" (Page 6 of the lease).

"To not assign this lease or any interest thereunder, and not to sublet the said premises or any part thereof, without the written consent of said lessor, and not to allow any person or persons not in privity with the parties hereto, to take or hold possession of said premises, or any part thereof, under any circumstances or any pretense whatever.

"To allow said lessor and its agents at any time to enter upon and into all parts of said mines and premises for purposes of inspection, or for any other purpose whatsoever.

"To pay to said lessor as Royalty ninety per cent. of the net mill returns of all ore extracted or to be extracted from said mines; and said lessor is to have the sole and exclusive control and right to say to whom and how the ores extracted from said mines, and the concentrates therefrom, shall be disposed of, and said lessee will be directed solely and exclusively how said ores and concentrates shall be sold and disposed of.

"To well and sufficiently timber said mines at all points where proper, and work and develop said mines in accordance with good mining.

"To deliver to said lessor or its agent or agents, all the said described mines, material and premises in at least as good condition as the same are now in at the

date of this lease; and without demand or further notice of any kind or character said lessee must deliver said described mines and premises over to said lessor on the 1st day of November, 1912, at noon on said day, or any other day or time previous thereto, upon demand for violation of any provision or covenant contained in this lease, or for forfeiture thereof.

"Said lessee must promptly pay for all labor and supplies of every kind and character whatsoever furnished to said lessee by any person or persons under or in privity with him used in operating and working said mines and premises under this lease; and if said wages of miners and laborers and workmen, and said supplies used under this lease are not paid promptly when due from said lessee, then said lessor at its election may declare a forfeiture of this lease, and take possession of said mines and premises upon demand therefor, and immediately upon said demand being made with or without force, and with or without process of law, and may proceed against any person or persons that may be found in occupation thereof as guilty of unlawful detainer."

Q. I direct your attention to a report of the receiver, parts of which have been read, that was filed in this court August 30, 1912. After that date did you still operate the mine?

A. Yes, sir.

Q. In what capacity?

A. As lessee.

Mr. SMITH: Now, this is already in evidence, I

believe. (Referring to report).

Q. This is your signature to it, is it, Mr. Betts?

A. It is.

Mr. SMITH: At this time I wish to read to the jury that paragraph 3 of this report, and I will read any other that counsel wants me to.

Mr. RICHARDSON: You might read the whole report.

Mr. SMITH: All right. It was just to shorten the thing.

*"In the District Court of the United States for the  
District of Oregon.*

The Hamilton Trust Company,

Complainant,

v.

Cornucopia Mines Co. et al,

Respondents.

To the Honorable Judges of the District Court of the  
United States for the District of Oregon:

Robert M. Betts, respectfully submits his report as  
Lessee and Receiver herein:

1. That said Robert M. Betts, was heretofore by an order of this Court duly appointed the receiver of the Cornucopia Mines Company of Oregon, a corporation, in the suit of the above named complainant in a mortgage foreclosure proceeding in this court.

2. That thereafter he duly qualified as such receiver in the above named suit and proceeding.

3. That during the said receivership of said Cornu-

copia Mines Company of Oregon as aforesaid he held and operated said Mines under a written lease with said Cornucopia Mines Co. from the first day of November, 1911 until the first day of November, 1912.

4. That hereby submits this his final report of the operation of said mines under said lease and receivership to this Court, said account showing that he received \$71,681.27 as receipts from ores, bullion and concentrates in the operation of said Mines of said respondent; that said account shows his total expenditures in the conduct and operation of said Mines, Stamp Mill, etc. in the sum of \$71,681.27, less a deficit of \$781.81. That he took proper signed vouchers for each and every item as set forth in the account attached hereto and made a part of this final report.

5. That he has examined each and every voucher and account of such expenditure, as shown by the vouchers, and finds the same correct and true.

6. That all the property of every kind and character real and personal, and all assets of Cornucopia Mines Company of Oregon, Respondent, were sold under a decree and order of this Court on the 29th day of June, 1912, by Ed Rand, the Special Master of the District Court of the United States for the District of Oregon, who was theretofore appointed by this Court as such special master, and before said sale as aforesaid he duly qualified as such special master; that at such masters sale as aforesaid, said property real and personal was sold to C. E. S. Wood, as trustee by said Ed Rand, as special Master of this Court, and

said sale was afterwards by this court duly confirmed.

7. That there is no other property real or personal of said Cornucopia Mines Company of Oregon, respondent unsold or remaining to be administrated upon by said receiver.

WHEREFORE, said Robert M. Betts, as such receiver prays this court to approve said final accounting and settle same; that upon the settlement of said account that said receiver be discharged as such receiver, and his bond exonerated.

Respectfully submitted,

Robert M. Betts."

Q. Now, when you operated that mine, did you keep an account or keep a record of your expenditures for each month?

A. Yes, sir.

Q. I will ask you to look at these documents and see if they are the records that you kept, the extended records and reports?

A. They are.

Q. I notice on the top of each one there is stamped "Robert M. Betts, Lessee." When was that put on there, Mr. Betts?

A. Why, it was put on at the time the vouchers were made out. Some of them are put on with the typewriter. The bookkeeper sometimes put them on with the typewriter and sometimes stamped them.

Mr. SMITH: To save time, I will just ask him the question, or if you wish to prove it by the document, I will show it to you.

Q. But do these documents, as lessee, show you the time of Johnnie Bisher? Does it show his working time?

A. Yes, sir, they should.

Q. Will you find one that does, if you can?

Mr. CALLAHAN: The first one.

Q. Colonel Callahan says the first one, Mr. Betts.

A. Yes.

Q. Have you the report there that shows it?

A. Yes, sir.

Q. Will you kindly read the item? Just read it out loud so the jury can hear it, please.

A. "John Bisher, Assistant Lineman, 9½ days at \$3.00 a day, \$28.50."

Q. That is on this single report, is it?

A. Yes, that is on this. Total \$28.50.

Q. Was that paid to him?

A. I am sure it was, yes, sir.

Q. This report is for the month of July, 1912?

COURT: Who signed that up when payment was made?

A. Mr. Buxton came up and got all the checks for the men working at the power plant, and he signed for them and took the checks down there.

COURT: Do you offer that in evidence, Mr. Smith?

Mr. SMITH: Yes.

Mr. RICHARDSON: I object to it on the ground it is incompetent, irrelevant and immaterial, not tending to substantiate any of the issues.

COURT: You offer that in connection with the court records?

Mr. SMITH: Yes, your Honor.

COURT: The objection will be overruled.

Mr. RICHARDSON: It is not a part of the court record.

Mr. SMITH: It is an exemplification of what he reported to the court.

Mr. RICHARDSON: This is not a part of the judgment roll.

COURT: Isn't this one of the vouchers, or is it?

A. It is one of the vouchers.

Mr. SMITH: This is a list of the expenditures that he made for a month. This is a compiled list from which he made the report, of course. This is the payroll itself.

Mr. RICHARDSON: But it has never been an exhibit in this other case. His vouchers were never filed with the clerk of this court in his receivership reports.

COURT: Haven't those been filed?

Mr. SMITH: That is the reason I am offering it now, to get it in evidence.

COURT: I will overrule the objection. You may save an exception.

Mr. BOOTHE: I believe it is understood that this paper that is being offered in evidence has never been filed with the court.

COURT: Yes, I understand.

Marked "Defendant's Exhibit H."

Q. What page was that he was paid? You say

Mr. Buxton signed it, Mr. Betts?

A. Yes, sir.

Q. On the second page of it?

A. Yes, sir, right here is a number of them. These men were working there.

JUROR: Which one is this?

A. John Bisher.

JUROR: Is the signature here of John Bisher the same as that of Harry Harbert, just above it, the same handwriting?

A. It is the same.

JUROR: Mr. Buxton did them both?

A. The mine is quite a ways above the power house.

Q. Mr. Buxton made that signature there. You don't claim that is Johnnie's signature?

A. No. Mr. Buxton took all the checks down to save the boys walking away up the hill to get the checks.

Q. Sometimes you would get the boys to sign, but this is sometimes signed for them? Is that it?

A. Yes, sometimes whoever happened to come up would get the checks and sign for them.

Q. But the signature on this Exhibit A is Johnnie Bisher's own signature?

A. He admitted it.

Q. The one dated July—

A. 15th.

Q. 15th, whatever it is?

A. Yes, sir.

Q. Did any one ever tell you, Mr. Betts, or did you know, that Johnnie Bisher was purporting to work up on a line like that?

A. No, I did not.

Q. You knew that he was a bright boy, and learning all he could, didn't you?

A. Yes, sir.

Q. Did you have materials there, or would you have furnished any man up there rubber gloves, if he had asked for them, or wanted them?

A. I would. I asked Harbert if he wanted them. He said no, that he would rather not use them.

Q. How long have you been connected with the Cornucopia Mines Company?

A. About four years and a half.

Q. During all that time was there ever any other man injured or hurt on that line, or wire?

A. No, sir.

Q. During that period did you maintain those wires in practically the same distance that they are on that cross-arm now?

A. The same distances, yes, sir, all the time.

Q. Did any man ever make complaint to you that there wasn't space enough there to work?

A. No, sir.

Q. I notice that this report that they talk about here is dated some time in August, 1912.

A. Yes, sir.

Q. I believe, to get it correct (referring to report) filed in this court August 30th. Now, after August,

who operated those mines, did the actual work there?

A. I did.

Q. Up to when?

A. Up until the first of November.

Q. That was the expiration of your lease, was it?

A. That was the expiration of my lease, yes, sir.

Q. I want to ask you a question. Counsel may object to it. I will then state to the Court what it is, and don't answer it unless the Court says you can. How long did you say you were connected with that mine up there?

A. Four years and a half.

Q. Do you know whether that company leased to other people within that four and a half years' period?

Mr. RICHARDSON: Just a moment. I object to that question.

COURT: What is that question.

Mr. SMITH: I was just asking him whether that company leased to other people, simply to show it was nothing uncommon for them to lease, and that there was no hocus pocus about this lease at all. They don't claim, as I understand, that there was.

COURT: During four years and a half prior to this lease?

Mr. SMITH: Yes, sir, showing they frequently operated, tried to operate through leases.

COURT: I don't think that would help this case.

Mr. SMITH: Very well. You may cross examine.

Cross Examination.

Questions by Mr. RICHARDSON:

Mr. Betts, you said, I believe, in your direct examination, that you asked Harry Harbert if he wanted rubber gloves?

A. Yes, sir.

Q. What did you ask him that question for?

A. Because I wanted to protect him as much as possible.

Q. You wanted to protect him from what?

A. From shock.

Q. From shock?

A. Yes, sir.

Q. How came you to suggest rubber gloves?

A. Why, because I thought it might help him. I knew that rubber gloves were made.

Q. You knew they had been used?

A. I knew they had been used, yes, sir.

Q. Did you have any?

A. No, sir.

Q. You didn't have any?

A. No, sir, never have had any there.

Q. Now, your report shows that Johnnie Bisher was assistant lineman, does it?

A. That is the way he appears on the payroll, yes, sir.

Q. Did you ask him if he wanted any rubber gloves, or needed any?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Why didn't you?

A. Because I had no idea that he was going on the pole.

Q. No idea he was going on the pole?

A. No, sir.

Q. Why didn't you think he was going on the pole, Mr. Betts?

A. Because Mr. Buxton said to me "I have a good man to change that pole line." I said, "Who is he?" He says, "It is a young man from the valley by the name of Harbert." I said, "That is good," and I thought that Mr. Harbert was going to fix that line.

Q. Did you offer to get anything else for Harry Harbert, Mr. Betts?

A. No, sir.

Q. You just happened to think of rubber gloves?

A. That is all I knew of.

Q. That is all you knew of?

A. Yes.

Q. You didn't know of any other device that would protect him, did you?

A. No, sir.

Q. You didn't say anything at the time about getting pliers with insulated handles, did you?

A. No, sir. I didn't know they made them.

Q. You didn't know they made them?

A. No, sir.

Q. How came you to know, Mr. Betts, that they made rubber gloves? Who told you about that?

A. Well, I cannot say how I happened to hear it. It is a matter of common knowledge. Almost any one

knows that rubber gloves are made.

Q. You heard the testimony of some of your witnesses, expert witnesses, didn't you—

A. Yes, sir.

Q. That they had never heard of them?

A. I didn't hear that.

Mr. SMITH: Of rubber gloves?

A. I didn't hear that testimony.

Mr. RICHARDSON: I was thinking that Mr. Myers or Mr. Hull said that.

Mr. SMITH: No. Mr. Myers said he had heard of everything except that sow-belly. He said he would like to see one of them.

Mr. RICHARDSON: Maybe it was a sow-belly. Very well.

Q. You just happened to think about these rubber gloves, Mr. Betts?

A. Yes, sir.

Q. You are not an electrician yourself, are you?

A. No, I am not.

Q. Just common knowledge that told you that that was a precaution?

A. Yes, sir. I had heard that it was a precaution.

Q. How did you know that Harry Harbert was working on the line?

A. I just said that Mr. Buxton told me that he had a good man to fix the line.

Q. And then did Harry Harbert come up to see you?

A. No, sir.

Q. Well, how came you to suggest to him about gloves, and where were you?

A. I rode down to the power plant.

Q. You rode down to the power plant?

A. Yes.

Q. Who was there, Mr. Betts?

A. Mr. Harbert, and I think Mr. Buxton.

Q. Anybody else?

A. Not that I remember of.

Q. Was this before Harry Harbert started to work on the line?

A. Yes, sir, a number of days before.

Q. A number of days before?

A. Yes, sir.

Q. You didn't tell him, or did Mr. Buxton suggest that he was going to have an assistant for him?

A. No, he did not.

Q. You didn't know that the laws of the State of Oregon required you to have your wires insulated, did you, Mr. Betts?

Mr. SMITH: Objected to as incompetent, irrelevant and immaterial. Ignorance of the law is no excuse for anybody. If it requires it, it does; if it doesn't, it don't. It is for the Court to say. It is immaterial whether he knew it or not. Men have been hung when they didn't know what the law was.

COURT: You may answer the question.

A. I did not.

Examination by the Court.

Q. At the time of this accident, was this power

plant being operated in connection with the mine?

A. Yes, sir.

Q. Was it used for any other purpose besides the operation of the mine?

A. No, sir.

Q. Entirely for that purpose?

A. Entirely for that purpose, yes, sir.

Cross Examination Resumed.

Q. Mr. Betts, is that your signature?

A. It is.

Q. You read that, didn't you?

A. Yes, sir.

Q. And what it contains is true, is it?

A. To the best of my knowledge, it is.

Mr. SMITH: Mr. Richardson, will you kindly identify the paper in the record, so we may know what paper it is.

Mr. RICHARDSON: Counsel handing to witness his report as receiver and lessee.

Mr. SMITH: It is the one that was already read at length, is it, so we can get it straight?

Mr. RICHARDSON: I will read the report in full.

COURT: Is that the one that has been read?

Mr. SMITH: It is already read. I read it to the jury at your request.

COURT: Then it is not necessary to read it again.

Q. Mr. Betts, you state in this report that you submit this report of the operation of said mines under said lease and receivership to this Court. Section 3,

you stated "that during the said receivership of said Cornucopia Mines Company of Oregon as aforesaid, he held and operated said mines under a written lease with said Cornucopia Mines Company." That he submits this, his final report of the operation of said mines under said lease and receivership to this Court, said account showing that he received \$71,681.27 as receipts from ores, bullion and concentrates in the operation of said mines of said respondent." That is true, is it, Mr. Betts?

A. Yes, sir.

Q. "That said account shows his total expenditures in the conduct and operation of said mines, stamp mill, etc., in the sum of \$71,681.27, less a deficit of \$781.81. That he took proper signed vouchers for each and every item as set forth in the account attached hereto and made a part of this final report." Now, Mr. Betts, this says the report of the receiver of the Cornucopia Mines Company of Oregon.

A. Yes, sir.

Q. Is that the report of the receiver of the Cornucopia Mines Company of Oregon?

A. Yes, sir.

Q. It is?

A. Yes, sir.

Q. Have you that voucher 583 there, Mr. Betts, or could you tell me from memory what the expenditure of \$4,015.70 was for?

Mr. SMITH: That is objected to. I think if the Court please, that would be perfectly proper when you

come to consider the final report as such. I cannot see what bearing it can have on this case.

COURT: That is on the theory of whether this amount was expended by the receiver or the lessee.

Mr. SMITH: I have no objection, if your Honor wants to hear any part of it.

COURT: I will overrule the objection. Go ahead.

Mr. SMITH: I will withdraw the objection, if the Court please.

Mr. RICHARDSON: It says on it there, Report of the Receiver of the Cornucopia Mines Company of Oregon. I don't think I will care to go into it, because the record itself shows it. I will withdraw that question.

COURT: Very well.

Q. Why did you make any reports to the Court? What did you make this report for?

A. Because I was instructed to by the Court.

Q. You were instructed to operate that plant, too, weren't you?

Mr. SMITH: We object to that, if the Court please. That is wholly immaterial.

COURT: This is cross examination. I will permit him to answer.

A. As I understand the order, I was to take possession—

Q. Of the plant?

A. Of the mine and the plant; the mine and the property.

Q. You obeyed the order of the Court, did you?

A. Yes, sir.

Q. You had possession on the 28th day of July, 1912, didn't you?

A. Yes, sir.

Q. You took possession upon the order of the court, didn't you?

A. Yes.

Q. The court ordered you to take possession, didn't it?

A. Yes.

Q. And you took possession?

A. I was already in possession.

Q. Well, why did you make any report to the court then?

A. Because I was instructed to. Is it all right for me to state the way I thought about it?

Q. Yes.

A. I had never been receiver before, and as I understood it, I was receiver for the company, but my receivership did not abrogate my lease, and the company had a certain royalty, had a certain payment coming. If the mine paid, they were to get a certain percentage, and I made the receiver's report, the report as receiver, and also it showed the money received during the time I was receiver, the money received during that time.

COURT: Received from what?

A. Received from the operation of the mine, from the mining end of it, bullion and concentrates.

COURT: All the bullion mined, or the royalties

only?

A. No, the whole thing, showing the total receipts from the mine.

COURT: That included the royalty and the ten per cent additional?

A. Yes, sir.

COURT: So that it included all the product of the mine.

A. It included everything, yes, sir.

COURT: And you received that as receiver?

A. Yes, sir.

Q. That is, you took account of it as receiver?

A. Yes, sir.

Mr. SMITH: The Court will understand that he just made a statement to show how it was. The mine was operated at a loss. As lessee, he lost money.

COURT: Yes, I understand. The lease provides that 90 per cent of the product of the mine shall go to the Cornucopia Mines Company, or the receiver, and I was getting at what he did.

Mr. SMITH: Yes, your Honor.

Q. Now, I see in this receipt that you received from bullion and concentrates \$11,662.96 in the month of January. That is correct, is it, Mr. Betts?

A. I think it is, yes, sir.

Q. And you received from bullion and concentrates, and that is the store, is it, trading company?

A. Cornucopia Trading Company.

Q. \$5,962.25 in the month of February, 1912, didn't you?

A. Yes, sir.

Q. And you received in the month of March, 1912, from bullion and concentrates—just bullion and concentrates?

A. Yes, sir.

Q. \$13,421.47, didn't you, Mr. Betts?

A. Yes, sir.

Q. Now, you received in April, 1912, from bullion, concentrates and Trading Company, and Standard Oil Company the amount of \$5,478.05, didn't you?

A. Yes, sir.

Q. You received in May 1912, from bullion and concentrates and S. & F.—what is that?

A. S. & F. Forwarding Company, it says, forwarding account with the Railroad Company.

Q. Coffenberry and Witten—you received that month \$8,709.32, didn't you, Mr. Betts?

A. Yes, sir.

Q. In the month of June, Mr. Betts, you received from bullion and concentrates and the store \$11,-386.65, didn't you?

A. Yes, sir.

Q. Now, in the month of July, 1912, the month in which the boy was injured, you received from Ross, concentrates, and yourself \$2100.—what was that \$2100? Did you advance that \$2100? What was that for, Mr. Betts?

A. Why, I was receiving no compensation as receiver, and as lessee I would credit my—

Q. Receiver account?

A. No, I would take money out of the—

Q. Receiver's fund?

A. No.

Q. Whom did you take money from?

A. I say, as lessee—I will get this straight.

Mr. SMITH: I think the witness has a right to answer the question. If he doesn't answer it counsel's way, if it is the truth, it is just the same.

COURT: Yes.

A. As lessee, I would take money as I needed it for my personal expenses, and the bookkeeper didn't understand—made a mistake—and I kept two sets of books, you understand, one as receiver and one as lessee, and he took money out of the receiver—well, let me see. I don't know how to make that plain.

Q. This is copied from your receiver accounts, isn't it? This is the receivership books, isn't it?

A. Yes, sir.

Q. This is copied from the receivership books?

A. Yes. And this amount was wrongly charged. It should have gone onto the lessee books, so when it was discovered, we credited the receiver account with that much money which had been drawn out.

Q. Well now, Mr. Betts, there is several thousand dollars—one hundred dollars, and \$3500., and \$455, and \$1,000 and \$3,078. in concentrates. Where did you get those concentrates?

A. Mining.

Q. You got them from operating the mine?

A. Yes, sir.

Q. Have you got Voucher 785 there? Let me see Voucher 785, Mr. Betts.

A. Will you state who it is from, or identify it.

Q. Just let me see it. Can you get it out?

A. It doesn't seem to show. 758—764—

Q. 785.

A. I don't see it here at this time.

Q. You think it is there, though?

A. It should be here. It accompanied the report.

Mr. RICHARDSON: Well leave those (vouchers) with the clerk or stenographer. I want to refer to those later on, your Honor.

COURT: Very well.

#### Redirect Examination.

Q. In these reports you show up the entire operation there, don't you?

A. I do.

Q. Receipts from all sources and all expenditures?

A. Yes, sir.

Q. Then there were no royalties at all—didn't make any?

A. No. No.

Mr. RICHARDSON: Now, if it please the Court, if the witness was a young and unsophisticated witness, I would not object to his leading his witness. I don't want him to lead this witness. I ask the Court to caution counsel not to ask these leading questions.

COURT: Don't ask leading questions.

Q. Did you make any money down there?

A. No, sir.

Mr. SMITH: Do you object to that?

Mr. RICHARDSON: No.

Q. Did you lose any money down there?

A. Yes, sir.

(Witness excused.)

Mr. RICHARDSON: I move, your Honor, to strike the question from the record for the reason it is incompetent and immaterial, has no tendency to prove or disprove any of the issues in this case, either to prove any of the defenses or disprove any of the allegations of the complaint.

COURT: It went in with your consent, expressed consent at the time.

Mr. RICHARDSON: Well, I let him answer it and then moved to strike it out.

Mr. SMITH: The object in asking it was to show that there was no royalty, that there were no net profits. That was my object in showing it, under the lease. That is all I think of now.

Mr. SMITH: I will recall Harry Harbert. It may be that counsel would concede what I wanted to show, which was that he was not a foreman over this Johnnie Bisher. All that he was there for was on the ground.

Mr. RICHARDSON: Not much, your Honor.

Mr. SMITH: All right, I will ask him the question.

Mr. RICHARDSON: I understood that that question has already been asked and answered by this

witness. He was asked time and again if he gave any orders to the plaintiff. He denied it. He denied giving any orders—that is, he denied it in words.

COURT: He has told his story from beginning to end—what Mr. Bisher did, and what he did, and what he did not do. I think he has covered that question enough.

Mr. SMITH: Very well, then. That is all, if the Court please. The defendant rests.

COURT: Any rebuttal?

Mr. RICHARDSON: Just one question to the plaintiff.

JOHN BISHER Jr., Recalled in rebuttal.

Direct Examination.

Questions by Mr. RICHARDSON:

Johnnie, you heard the testimony of Harry Harbert?

A. Yes, sir.

Q. In which he stated that you had only changed the insulators on eight poles at the time you were injured? Was that true?

A. No, sir.

Mr. SMITH: Just a moment. This is not rebuttal. They have his entire statement as to what he claims was done.

COURT: I will allow the question.

Mr. SMITH: Very well, may it please the Court. It is in your Honor's discretion.

COURT: What is the answer?

A. No, sir. We changed about twenty.

Q. Now, Johnnie, you heard the testimony of Mr. Buxton in regard to what you said when you were at the store after your injury?

COURT: Wasn't his attention called to that when he was on the stand in chief?

Mr. SMITH: Very particularly, if your Honor please.

Mr. RICHARDSON: I believe we did, your Honor.

Mr. SMITH: Also in the automobile and also at the hospital. I was very careful to call his attention to all of them.

Mr. RICHARDSON: Yes, that is right.

Q. Now, you heard, Johnnie, the statement made by Harry Harbert that it was not your duty to climb the pole, and he told you that you should not climb the pole, and that it was just your duty to carry the insulators along, and act as a groundman, or words to that effect. Was that true?

A. He told me to come up the pole.

Q. I know. You heard his testimony as to what he said, that you were not allowed to come up the pole?

A. Yes, sir. I remember it.

Q. Was that true?

A. No, sir.

Q. You heard his statement about your employment, and you also heard Mr. Buxton's statement that he did not show you how to tie a wire, and instructed

you that you should not climb any poles.

Mr. SMITH: Just a moment. That was particularly gone over in his direct examination.

COURT: He testified in his examination in chief, if I remember right, that Buxton did tell him how to tie he wire.

Mr. RICHARDSON: Yes, I think that is right. I believe that is all, your Honor. I believe he has practically denied on cross examination.

COURT: Do you want to cross examine?

Mr. SMITH: No. No cross examination.

(Witness excused.)

COURT: Is that all?

Mr. RICHARDSON: That is all, your Honor.

Mr. SMITH: Before proceeding, if your Honor please, to get the record, we desire to interpose a motion for a directed verdict. The defendant at this time asks the Court to instruct the Jury to return a verdict for the defendant upon the following grounds: First, the evidence shows that both plaintiff and defendant are residents, citizens and inhabitants of the State of Oregon, and this Court has no jurisdiction of the case. The bare fact that the defendant is sued as receiver in a court action, does not give this court jurisdiction where the diverse citizenship does not exist.

Second, the evidence conclusively shows that Robert M. Betts, Lessee, was operating this mine, and electrical plant at the time of the injury and not Robert M. Betts as Receiver, and that by reason of the

sale of the property, the duties of the receiver had terminated.

Third, That the evidence fails to disclose any proximate cause for the injury other than the negligence of the plaintiff himself. There is no negligence of the master which is shown to have contributed in any way to the injury.

Fourth, The testimony shows that the plaintiff was a volunteer, that the master owed him no duty; that his duties did not require him to be on the pole, or among the wires; that the master did not know that he was among the wires, or on the pole, or was attempting in any way to discharge duties thereon.

Fifth, The evidence shows that the injury was occasioned solely by the negligence of the plaintiff.

COURT: The Court will overrule the motion.

Mr. SMITH: We will note an exception on the several grounds separately, if the Court please.

COURT: Very well.

During the course of Mr. Richardson's argument the following occurred:

Mr. RICHARDSON: Now, gentlemen, what about Mr. Betts. When we had Mr. Betts, this lessee Betts—lessee Betts on the witness stand, that he likes to be called. That is the title that he wants to be called. When he was on the witness stand, I asked Mr. Betts, I says, "Mr. Betts, what about these rubber gloves?" First I asked him if he was an electrician. "No." "How came you to suggest to Harry Harbert that you would give him rubber gloves? Did

you have any there?" "No." "How came you to suggest it?" "Well, I just naturally thought about it. It just naturally kind of occurred to me that maybe he might want them." Now, gentlemen, there is a man that is not an electrician, a man that is not versed in the proper devices that an electric lineman needs, by his own admissions, and still he would come in here and he would have you believe from that witness stand that he was the one that suggested about rubber gloves. Gentlemen, I will tell you, that will not hold water. That does not appeal to a man of real common ordinary intelligence as being something that a man like Betts would think. It looks like it must be a lawsuit, gentlemen, that suggested that, or an injury that suggested that. It looks like the same thought suggested that to him that suggested that he was all of a sudden, instead of being a receiver of the Cornucopia Mines Company, he was a lessee.

MR. SMITH: We except to the remarks of counsel, and assign them as error.

MR. RICHARDSON: Your Honor, I did not make very many interruptions, and I am drawing inferences. The jury knows that I am not stating these as facts.

COURT: I will overrule the motion. You may save an exception.

### [Instructions.]

Gentlemen of the Jury:

This is an action brought on the part of John L.

Bisher, as guardian ad litem of John L. Bisher, Jr., and it is to recover for what injuries the boy has suffered on account of this accident. The action is brought against Robert M. Betts, as the receiver of the Cornucopia Mines Company. The action is based upon negligence of the defendant as receiver. It is alleged, among other things, that the defendant as receiver, was engaged in the transmission of electricity over wires, three copper wires, from the place where the electricity was generated to the Cornucopia Mines Company for use at the plant. It is described that these lines were stretched upon poles about 25 feet from the ground; that they were three in number; and that there was also stretched upon these poles a line about seven feet below the copper wires.

Now, there are several grounds of negligence which the plaintiff alleges, and the plaintiff must recover upon the grounds of negligence alleged. He cannot recover upon any grounds outside of that, if any exist, but you must confine your examination to the grounds alleged in the complaint.

It is first alleged that the defendant was negligent in failing to insulate the transmission wires at the poles and arms upon which they rested; and,

Second, that in stringing the wires the defendant was negligent in stringing the wires too close to the poles and supports, so that it would not admit of workmen working safely between the wires, or between the poles and the wires; and, incidentally, it may be said that they claim that the wires were strung

too close together.

Third, in mingling a dead wire with live wires. This has reference to the wire which was strung seven feet below the copper wires.

Fourth, in failing to designate the arms and supports by colors or otherwise, so that they might be seen and recognized at once.

Fifth, in failing to use care and precaution to protect employees; that is, in supplying them with tools and implements, and in giving proper instructions about their work.

Sixth, in directing the workmen to carry on their work in a dangerous place, knowing them to be ignorant of the danger.

Seventh, in directing the workmen to climb the poles without furnishing them with ladders or other appliances for the purpose.

Eighth, in failing to turn off the electricity while the work was being carried on on the poles.

Now, these are the several acts of negligence which the plaintiff has alleged, and which he relies upon for recovery in this case.

The defense denies that Bisher was employed by Betts as receiver, but they allege that he was employed by Btts as the lessee of these mines. And they further allege that Bisher was employed to do work upon the ground, in carrying tools and implements, and not to work upon the poles. And then it is further alleged that the defendant used due care and precaution in construction, and in providing for the

safety of the workmen; that is, in constructing the lines and in doing that in such a way that workmen might go up on the poles and work with safety to themselves. And it is further alleged as a defense that Bisher ascended the pole outside of his duties, and that his act in that respect was voluntary. In other words, they allege that Bisher's duty or his employment, under his instructions, was to work upon the ground in carrying the tools, and that under those instructions he was not to ascend the poles, or to do or perform any work about the wires in securing their insulation. And furthermore, it is alleged as a defense that the plaintiff assumed the risk of his own employment. And it is further alleged also that the act to which reference has been made here, which was adopted by the initiative, is unconstitutional, in that it deprives the defendant of the right to set up contributory negligence.

Such being the issues, you will proceed to find, first, whether young Bisher was in the employ of Betts as receiver, or whether he was in the employ of Betts as lessee. This is made a direct issue in the case, and it is for you to determine that issue. It is admitted that Betts was appointed receiver. This is admitted by defendants themselves; and that he continued to be receiver until after this accident transpired, and is now receiver. On the other hand, they say that Betts was the lessee of these mines, and was working in that capacity at the time this accident happened. The lease has been offered in evidence, and you have it

before you, gentlemen of the jury. It bears date, I think, acknowledged on the 9th day of November, 1911. It is also shown to you by the record which has been offered in evidence here, that the suit was commenced subsequent to the time that this lease was executed and to the time that Betts was constituted lessee of these mines; and also that the receiver was appointed subsequent to that time, and that he took charge as receiver subsequent to that time. Now, these two positions are not inconsistent. Betts could act as the lessee of this mine and also act as the receiver of this mine without one duty being inconsistent with the other. That is to say, if appointed receiver, he would take charge of the mine as receiver, to be operated or to be conducted, or the estate to be closed up subject to the leasehold estate in the premises. Now, it is for you to determine, and I will submit that question to you as a matter of fact, whether or not Betts, at the time this accident occurred, was acting in the capacity of a receiver. If he was, then the negligence, if negligent at all, would be attributed to him. Or whether Betts was acting as lessee. If he was acting as lessee at the time this transaction occurred, or this accident happened, then he would not be responsible. And this fact you must determine from the record which has been offered in evidence here, from what was done in the record, and the returns that have been made, and what Betts reported as having done in the premises, and determine from that record whether or not Betts was acting at the

time this accident happened as receiver of these mines, or whether or not he was acting in the operation of the mines as a lessee of the mines.

If you find that he was acting as receiver, then you will proceed to a further examination, and find whether or not the defendant has been guilty of negligence in some one or more of the particulars specified in the complaint. You must keep in mind, gentlemen of the jury, that the act of negligence must be an act which contributes proximately to the injury itself. An act that did not contribute to the injury could not be held as against the defendant in this case. I will refer to one circumstance to illustrate the matter to you. It is alleged here as one of the specifications of negligence that the defendant was negligent in constructing the dead wire on these poles, and that wire, as I have indicated to you and as the evidence shows, was constructed on the poles seven feet below the copper wires. Now, that act of constructing the dead wire must be an act that would contribute proximately, or would constitute the proximate cause of the injury. If it is not, then that cannot be considered by you in this case. And I refer to that only as an illustration which will apply to all the other specifications of the negligence of the defendant. What we mean by a proximate cause is that cause which contributes directly to the injury. It must be the potent force which directly produces the result.

Now, negligence, gentlemen of the jury, may be defined shortly as the doing of some act or thing which

a reasonably prudent person would not do under the circumstances and conditions then existing, or the leaving undone of some act or thing which a reasonably prudent person would have done under like circumstances and conditions.

Now, the employer owes certain duties to his employees. The employer is never an insurer against accident, but he must use ordinary care and precaution to see that the employee is furnished with safe tools and implements with which to work, and a safe place in which to work. The care which a person is required to observe is such care and prudence as an ordinarily careful and prudent man would exercise in the occupation in which the person is employed. I will say to you, however, that where a person is engaged in a highly dangerous occupation, such as the transmission of an electric fluid or electric energy, he must use not only ordinary care, but the highest or utmost care in seeing that the employee is protected from injury.

Now, I will call your attention to the statute in this case, and make such remarks with reference to it as I deem pertinent. The statute requires that all persons engaged in the erection or operation of any machinery, or in the "manufacture, transmission, and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested, so as to detect any defects;

\* \* and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor, or subcontractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent, and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and, generally, all owners, contractors, or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

This statute is intended to be an operative statute, and was intended also to permit persons to operate in certain occupations, or in the occupation, we might say by specifying the transmission of electric energy. It was not designed by the statute to compel persons to go out of the business, but it was designed to pro-

tect persons or employees where the occupation is being carried on. And hence we might say in this case that the requirements of the statute were not designed to kill the business of the persons engaged in the transmission of electric energy, and you must give the statute, or the court must, such reasonable construction as will permit people to go on with the work. And if it appears that the requirement of the statute will absolutely prevent people from operating any electric energy, why then we must give the statute such reasonable construction as will permit persons to go on with the work. And in this connection I will give you an instruction which is asked by one of the parties:

"If you believe from the evidence that it was not practicable for the employer to insulate the wires at the place of the happening of the injury, and if you further believe that the weather insulation spoken of was not practicable to use at that place, then I instruct you that the law does not require a vain or useless thing to be done. All statutes must be read and construed and applied to human affairs by the rule of reason, and the duties which are imposed upon masters by what is known as the Employers' Liability Law of Oregon are such duties and obligations as can be performed reasonably and efficiently, and no obligation is laid upon the master to place upon his business an expense in furnishing appliances which are prohibitory either by the extreme cost or frequent renewals, which by the frequency of the renewal of such

appliances would compel the employer to close his enterprise. If you therefore believe that it was not practicable for the employer to insulate the wires and keep them insulated as against shock at the place of the injury, then I instruct you, as a matter of law, that it was not the duty of the employer to attempt to insulate the wires with weather insulation and you cannot consider his failure to so insulate the wires and keep them insulated as negligence."

You must take into consideration in this connection, gentlemen of the jury, whether or not the defendant could have insulated these wires as required by the statute and still continued his business. If it was too expensive to do that—if the expense laid upon the business by the insulation was such that the party must go out of business, or that it would render his occupation unprofitable so that he could not operate, then you must determine from all the facts in the case whether or not he used due care and precaution—the utmost care and precaution, you might say in this case—in doing what he did do in the premises in the placing of these wires and leaving them uninsulated.

You will determine further than this whether or not the defendant here used due care and precaution, such as I have defined to you that defendant must use in this case, in placing the wires upon the supports, the kind of support that was provided, and the distance the wires were placed from the supports, and the distance the wires were placed apart one from the other, and determine whether or not the defendant

has used ordinary and due care, such care as is required when engaging in the transmission of this dangerous agency by a person who would exercise such care for the protection of his workmen.

It is furthermore insisted that the defendant did not furnish the appliances that he should have provided in the present case. I refer to the furnishing of rubber gloves and pliers, and the body protectors that have been referred to in the testimony. It is the duty of the employer, as I have indicated before, to furnish proper appliances for use by the employees looking to their protection, and in this case there has been a good deal said about the rubber gloves, and about the defendant not having furnished rubber gloves when he ought to have furnished them. I will give you an instruction as follows:

“As to rubber gloves, I instruct you that if you believe from the evidence that the nature or character of the work in question was such that rubber gloves were not an essential requisite, then failure to furnish them would not be negligence.”

Now, if you find, gentlemen of the jury, that the defendant was acting as receiver when this accident happened, and if you find further that he was negligent in one or more of the particulars which have been enumerated and specified in the complaint, then you will pass to the defenses, and find, first, whether Bisher was a volunteer in doing what he did which resulted in his injury. It is claimed that he climbed the pole and attempted to assist in readjusting these

wires voluntarily, and without the direction of any one. I will instruct you, gentlemen of the jury, if his duties as assigned him by his employer were to work upon the ground alone, and not to ascend the pole, and if he voluntarily ascended the pole and attempted to engage in the work there, then he would be a volunteer in the premises, and the defendant would not be liable for his injuries. But in considering this matter, you must take into consideration who gave instructions with reference to the work of young Bisher. It is said in the testimony that Mills, being the foreman or the superintendent, desired to employ young Bisher, and that he sent him to Buxton, and that Buxton had authority in the premises, which is not denied. Then Buxton directed him to work with Harbert, and in that relation you will determine whether or not Harbert had any authority in the premises, whether or not he had authority to direct young Bisher what to do, and whether or not he had authority to direct young Bisher to go up these poles and to assist in the fixing of these wires. If he had such authority, why, then his authority would be binding upon the defendant in the case, and if he directed young Bisher to do what he did do, and the accident happened through the negligence of the defendant, or by reason of any of the acts of negligence alleged, then the defendant would be responsible for it.

Now, there are some instructions I will give you in this relation :

“If you believe from the evidence that Johnnie

Bisher, at the time he was injured, was on the pole and was not in the discharge of any duty imposed upon him, or if he was on the pole in a furtherance of his own learning or enlightenment, and his duties did not require him to go up on the pole or among the wires, then he is what is known in law as a volunteer and he cannot recover in this case and your verdict must be for the defendant."

And again:

You are instructed that no person can recover damages from another for injuries inflicted by himself. If, therefore, you believe from the evidence that at the time of the injury Johnnie Bisher received the same while doing an act which his duties did not require, or in any other way than through the negligence of his employer, then I instruct you that he cannot recover in this action, and your verdict should be for the defendant.

And, further:

"I instruct you that the evidence shows that Johnnie Bisher knew the current was on these wires, also the volume of voltage and that said wires were alive, and if you believe that his duties as supply boy did not require him to work among the wires or on the poles, but that he was acting outside his duties as supply boy, then I instruct you that he assumed the risk of danger, and if he was injured outside the scope of his duties as supply boy then he assumed the risk of the injury and he cannot recover, and your verdict should be for the defendant.

I think I should instruct you a little further as to the statute in this case, so that you may understand fully the relations existing here. The statute provides furthermore, that in all actions brought to recover from an employer for injuries suffered by the employee, the employer is made responsible for "any defect in the structure, materials, works, plant, or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery, or appliances; the incompetence or negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed there-to the injury or death resulted; the act of any fellow-servant done in obedience to the rules, instructions, or orders given by the employer or any other person who has authority to direct the doing of said act." This you will consider in connection with the question whether or not Harbert was a person authorized by the defendant to direct what Bisher should do, and whether or not he did direct him to assist in regulating these wires.

And you will next consider, gentlemen of the jury, whether Bisher assumed the risk of his employment. Now, the assumption of risk means simply that, where

one person enters into the employment of another for the doing of some dangerous work, if that person knows the work he is to enter upon and appreciates the danger, and notwithstanding that, if he still enters into the employment, in such a case he assumes the risk, and the pay that he receives is supposed to compensate him for the dangerous work which he is entering upon.

In this case you will consider also the immature years of the young man who was doing this work, or the plaintiff's ward. A boy of immature years is not supposed to have the same discretion as a person older than he, or having had greater experience; and you must determine in this case whether or not this boy acted, in entering upon this employment, as a boy of his years would act in the premises—not as a man of mature years would act, or what a man of mature years might appreciate and understand but what a boy of this age would appreciate and understand. In this relation, I will read an instruction for your guidance:

“You have a right to take into consideration the age and experience of the plaintiff as to his understanding and appreciation of the danger. In the case of minors, they sometimes understand but fail to appreciate danger. It has been determined by our courts that only such care and caution to avoid the dangers of accident can be expected or required of a person of immature age as is common to other persons of his years, of prudence, forethought

and discretion. This must necessarily be so because infancy and youth spring into manhood and maturity by degrees only and responsibility develops accordingly. In general, the servant assumes the ordinary risks and dangers incident to the employment in which he engages to the extent, and only to such extent as they are known to him, but if the employee be of immature years, the assumption of risk is commensurate only with his age, experience and capacity."

Now, the next ground of defense which you will consider is that the act is unconstitutional. I will say to you, as a matter of law, gentlemen of the jury, that this act is not unconstitutional, but that it is constitutional, and that the matters and things declared therein to be law should be observed and enforced.

I do not understand that the answer alleges contributory negligence any further than this, and so it is unnecessary for me to enter upon that discussion further.

Mr. RICHARDSON: Contributory negligence is one of their defenses, your Honor. I would like that rule of contributory negligence given.

COURT: I will not give it unless it is so alleged.

Mr. SMITH: The defense is really for negligence we have set up; not contributory negligence. There is a vast difference between negligence and contributory negligence.

COURT: On the part of the boy?

Mr. SMITH: Yes.

COURT: Then that would be contributory negli-

gence in this case, if you depend upon that.

I will instruct you, gentlemen of the jury, that the statute has provided this: "The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damages." What we mean by contributory negligence is negligence on the part of the plaintiff; and if you find that the plaintiff, the boy, in any work that he was doing, contributed to his own injury—if you find that to be a fact, if you find it to be a fact that he did so conduct himself that his own acts contributed to his injury, then you will take that into consideration with the negligence of the defendant, if you find the defendant negligent, and you will consider it all together in determining the amount of damages which the plaintiff should recover.

The plaintiff has the burden of proof in establishing negligence as alleged in the complaint. What we mean by burden of proof is the establishment of the fact alleged by a preponderance of the evidence. If the plaintiff has made out his case by the weight of the evidence so that it carries the scales down on his side, be it ever so little, he would have a right to recover.

The defendant as to the affirmative defenses set up also has the burden of proof as to those defenses; and if you find the plaintiff negligent, and that the defendant has established the affirmative defenses alleged by a preponderance of the evidence, why then, of course, the defenses must stand, and the verdict

would then be for the defendant.

You are to be the judges of the credibility of the witnesses. The court gives you the law, and you will follow his instructions as to that; but you are the sole judges of the credibility and the effect of the evidence. You must determine the credibility of the witnesses by the manner of their testifying upon the witness-stand. Every witness is presumed to speak the truth, but this may be overcome by the manner in which he testifies, and by contradictory evidence and other evidence which tends to discredit his testimony. And in this relation you may take into consideration the interests which the witnesses have in the outcome of this action.

I will instruct you further that, whatever the court may have said during this trial, or throughout the trial, which in any way tends, if anything of the kind has been said, to indicate to you the mind of the court upon the facts in this case, you must disregard that entirely unless what might have been indicated corresponds with your views and conclusions in the premises.

As to the measure of damages, I will give you an instruction which has been given in another case upon that subject:

There is no rule of law which the court can state to you by which the amount of damages can be ascertained to a mathematical certainty. In cases of this character, that question must be left largely to the judgment—it must be left entirely to the judgment

and discretion of the jury, under certain rules which I will call to your attention. You will have a right, in estimating the amount of damages, to consider the pain and suffering the plaintiff endured on account of the accident; the loss of time incident thereto; his impaired earning capacity, if it is so impaired by reason of the injury. It will also be necessary for you to consider whether or not the injury is likely to be permanent, or to continue for any great length of time. And after considering all these questions, then it is your duty, if you find in favor of the plaintiff, to assess his damages at such a sum as you in your judgment think is a fair compensation in dollars and cents for the injury which he has suffered.

That completes the instructions, unless the counsel have some suggestion to make.

Mr. SMITH: Just one suggestion, if the Court please, that I think would clarify the matter a little. I think the Court is very plain about the distinction between operating as receiver and lessee, but I believe your Honor omitted the latter part of the instruction, that if the jury find that Mr. Betts was operating as lessee the verdict should be for the defendant.

COURT: Yes, that is understood, of course.

Have you any exceptions to take to the instructions?

Mr. SMITH: I presume we might agree that either side may have an exception to those instructions requested and not given by the court.

Mr. BOOTHE: We can agree on that some other time, your Honor.

COURT: The exceptions must be taken now. That is the rule of this court, that the exception must be taken before the jury.

Mr. SMITH: To the requests which I made, I have put after each request that if the instruction is not given as requested, I should except thereto. Does the Court think I should except in addition thereto?

COURT: Yes, you may save your exception to each request not given.

Mr. SMITH: Yes, your Honor.

Mr. RICHARDSON: The Court covered most of the instructions requested by the plaintiff, but in order to be sure of my rights, the plaintiff excepts to all instructions not given as requested in his requested instructions.

COURT: Very well.

Mr. SMITH: I think the Court covered nearly all that we asked, but then at the same time we want the exception.

COURT: Gentlemen of the jury, if you find for the plaintiff, your verdict should be like this: "We, the jury duly sworn and impaneled in the above entitled action, do find for the plaintiff, and against Robert M. Betts, the Receiver of the Cornucopia Mines Company of Oregon, the defendant, and assess plaintiff's damages in the sum of ..... Dollars." You will fill in the amount of damages, and the verdict will be signed by the foreman. When you retire you

will select one of your number as foreman. The verdict for the defendant is merely, "We, the jury, find for the defendant," if you find that way, and that will be signed by the foreman.

Now, gentlemen, you may retire to consider your verdict.

Jury retire.

**[Defendant's Exhibit G.]**

This INDENTURE made this 1st day of November in the year nineteen hundred and eleven, by and between the CORNUCOPIA MINES COMPANY OF OREGON, a corporation duly created, organized and existing under and by virtue of the laws of the State of Maine (hereinafter called the lessor) party of the first part, and Robert M. Betts, of Spokane, Washington, hereinafter called the "lessee", party of the second part:

WITNESSETH:

The said lessor for and in consideration of the royalties, covenants and agreements hereinafter reserved, and by the said lessee to be paid, kept and performed, hath granted, demised and let, and by these presents doth grant, demise and let unto the said lessee all of the following described real and personal property, mines and mining property, mining claims and equipment situated in the County of Baker, in the State of Oregon, and more specifically described as follows:—

1. All that certain quartz lode, mining claim, known, located and recorded as the "Union", the same

being designated by the Surveyor General as lot No. 310, embracing a portion of Section 28 T6 SR 45 E. W. M., and designated in the United States Land Office at LaGrande, Union County, Oregon, as mineral entry numbered 125, containing 19.27 acres more or less.

2. All that certain quartz lode mining claim, known, located and recorded as the "Companion", the same being designated by the Surveyor General as lot No. 312, embracing a portion of Section 26 T6 SR 45 E. W. M., the same being designated in the United States Land Office at LaGrande, Union County, Oregon, as mineral entry numbered 124 and containing 12.57 acres more or less.

3. All that certain quartz lode mining claim, known, located and recorded as the "Red Jacket", described as follows: Beginning at a corner post No. 1 s. 61.05 east 1563 feet from the quarter section corner between Sects. 27 and 28 T6 SR 45 E. W. M., marked corner No. 1 R. J. M. C. sur No. 10, thence N 15. 1032 East 1353 feet to corner post No. 2, thence N. 82 west 600 feet to corner Post No. 3, thence S. 91.015 west 1339 feet to the corner post No. 4, thence S 82 East 450 feet to place of beginning, designated by Surveyor General as lot No. 43 embracing a portion of Sec. 28 T6 SR E. W. M., certificate No. 68, and containing 16.13 acres more or less.

4. All that certain quartz lode mining claim, known, located and recorded as the "Prescott", the same being designated by Surveying General as lot

No. 313, embracing a part of section 26 T6 SR 45 E. W. M., and designated in the United States Land Office at La Grande, Union County, Oregon, as mineral entry numbered 126, and containing 11.60 acres more or less.

5. All that certain quartz lode mining claim, known, located and recorded as the "Phoenix" described as follows: Commencing at monument west and centre of claim which is also at N. E. corner of Union Mine and S. E. corner of Companion Mine, thence northerly along east side line of Companion Mine, 300 ft. to monument at N. W. corner of Phoenix claim, thence easterly 500 feet to N. E. corner Monument of claim, S. E. corner of claim being also at N. Centre and thence 600 ft. to monument of Lone Star U. S. Survey 219 westerly 500 ft. to S. W. corner of claim on east side line of "Union Mine", thence northerly 300 ft. along said Union side line to place of beginning, the same being designated by Surveyor General as Lot. No. 311, embracing a part of Sec. 28 T6 SR 45 E. W. M., and designated in the United States Land Office at La Grande, Union County, Oregon, as mineral entry numbered 128, and containing 5.52 acres more or less.

6. All that certain quartz lode mining claim, known, located and recorded as the "Helena", the same being designated by Surveyor General as Lot No. 314, embracing a portion of Sects. 28 & 33 in T6 SR 45 E. W. M., and designated in the United States Land Office at La Grande, Union County, Oregon, as

mineral entry numbered 127, containing 17.47 acres more or less.

7. All that certain quartz lode mining claim, known, located and recorded as the "Montana Consolidated", comprising the quartz lode mining claim known, located and recorded as the "Omer", "Montana", "Cliff" and "Butte", designated by the Surveyor General as lot No. 321 embracing a portion of Sects. 21 & 28 T6 SR 45 E. W. M., and also designated in the United States Land Office at LaGrande, Union County, Oregon, as mineral entry numbered 134 and containing 40.89 acres more or less; for a most particular description of said "Montana Consolidated" reference is had to the location notice thereof recorded in Book F of quartz mining claim, page 402 of the Union County records.

8. All that certain quartz lode mining claim, known, located and recorded as the "Whitman" and designated by the Surveyor General as Lot No. 37 embracing a portion of Sects. 27 & 28 in T6 SR 45 E. W. M., said lot extending 1370 feet in length along said lode and embracing 18.87 acres more or less.

9. All that certain quartz lode mining claim, known, located and recorded as the "Alta", and designated as Lot No. 38 embracing a portion of sections 28 & 28 in T6 45 E. W. M., said lot extending 1300 ft. in length along said lode.

10. All that certain quartz lode mining claim, known, located and recorded as the "Bruin", designated as Lot No. 39, embracing a portion of Sect. 27

in T6 SR 45 E. W. M., said lot extending 1300 ft. in length along said lode and embracing 16.87 acres more or less.

11. All that certain quartz lode mining claim, known, located and recorded as the "Eagle", and designated as Lot No. 41, embracing a portion of Sec. 27 T6 SR 45 E. W. M., said lot extending 1500 ft. in length along said lode, final mineral entry 48 for the S. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of Sec. 27 N. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  Sec. 34 T6 SR 45 E. W. M., and embracing 20.66 acres more or less.

12. All that certain quartz lode mining claim, known, located and recorded as the "Creek", designated as Lot No. 40, embracing a portion of Sec. 27 T6 SR 45 E. W. M., said lot extending 1600 ft. in length along said lode, and designated as Lot No. .... final mineral entry No. 49 for the E.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  Sec. 34 E.  $\frac{1}{2}$  S. W.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$  E.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$  E.  $\frac{1}{2}$  S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$  Sec. 27 T6 SR 45 E. W. M., and embracing 20.66 acres more or less.

13. All that certain quartz lode mining claim, known, located and recorded as the "Annex Placer", designated as Lot No. 42, embracing a portion of Sec. 27 T6 SR 45 E. W. M., said claim embracing 6.73 acres.

14. All that certain quartz lode mining claim, known, located and recorded as the "Motor", designated by the Surveyor General as lot No. 190, embracing a part of Sects. 28 & 33 in T6 SR 45 E. W. M., certificate No. 155, and containing 3.92 acres more or

less.

15. All that certain quartz lode mining claim, known, located and recorded as the "Gore", designated by the Surveyor General as Lot No. 320, embracing a part of Sec. 26 T6 SR 45 E. W. M., certificate No. 154, containing 6.25 acres, more or less.

16. All that certain quartz lode mining claim, known, located and recorded as the "Last Chance", consolidated mining claim consisting of all the divided north one-half of the "Last Chance" mine or mining claim and all of the White Swan mining claim, the location of said claims being of record in the records of Union County, Oregon, at Union, to which records reference is hereby made for a further description.

17. All that certain quartz lode mining claim, consisting of the south one-half of the "Last Chance" quartz lode mining claim, being the original location of E. P. Howard and John Carey, and designated by the Surveyor General as Lot No. 39, embracing a part of Sec. 28 T6 SR 45 E. W. M., certificate No. 100 and containing 7.76 acres more or less.

18. All that certain quartz lode mining claim, known, located and recorded as the "Moonshine", said mine being 400 feet more or less in length by 600 ft. in width and lying between the "Maverick" fractional claim and the "Mayflower" quartz claim.

19. All that certain quartz lode mining claim or fractional quartz ledge, known, located and recorded as the "Maverick".

20. All that certain quartz lode mining claim,

known, located and recorded as the "Florence", described as follows: Commencing at the north and centre monument of east side line of Union Mine and running thence northerly 300 ft. to the line of the "Prescott" mining claim, thence southwesterly 1500 ft. along line of said Prescott mining claim, thence 600 ft. southerly, thence 1500 ft. N. E. to the S. E. corner of the Union Mine, thence northerly 300 ft. to the place of beginning.

21. All that certain quartz lode mining claim, known, located and recorded as the "Red Fox", and recorded in book G, p 103, of Records of Quartz Locations, in the office of the Clerk for Union County, Oregon, to which reference is hereby made for further description.

22. All that certain quartz lode mining claim, known, located and recorded as the "Old Gray Fox", and recorded in Book G, p 103, of Records of Quartz Locations, in the Office of the Clerk for Union County, Oregon, to which reference is hereby made for further description.

23. All that certain quartz lode mining claim, known, located and recorded as the "Dunn & Norton", said claim being located by Thomas H. Dunn and William Norton, on May 4th, 1891, and recorded in Book F, page 302, of Records of Quartz Locations, in the Office of the Clerk for Union County, Oregon, May 12th, 1891, to which reference is hereby made for further description.

24. All that certain quartz mining claim known,

located and recorded as the "Coupd'Or", and described as follows: Bounded on the South by the Main Elk Creek and the Spot Quartz Claim; on the west by the Hope Mill and Flagg Staff Mine, and about one-fourth of a mile to the west from the town of Cornucopia, being the same quartz lode mining claim granted by Lawrence Panter and Dominique Soldini, by Lawrence Panter, his attorney in fact, to John E. Searles, by deed recorded in Book 47 of Deeds, p. 603 of Records of Union County, Oregon.

25. All that certain tunnel right or mining claim known as the "W. J. Clark Tunnel Claim", located by William J. Clark on July 23rd, 1896, location notice whereof is duly recorded in book F, p. 409, of Records of Quartz Mining Claims of Union County, Oregon, to which reference is hereby made for further description.

26. All and singular that mill site known as the "Prescott Mill Site", consisting of five acres of non-mineral ground described as follows: Commencing at the S. E. corner of the Prescott Mining Claim and running thence southerly to Elk Creek, then up Elk Creek to east side line of Ohio Mining claim, thence northerly to S. W. corner of Prescott Claim, thence westerly along south end line of Prescott claim to place of beginning, the location notice whereof was recorded in Book 1 of Mill Sites, p. 126, Union County Records to which reference is made for further description.

27. All and singular that mill site known as the

"Motor Mill Site", consisting of the triangular area of non-mineral land containing less than five acres, situated between the north end line of the "Motor" Mining Claim as officially surveyed, the west side of the Lone Star claim and the east side line of the Lodi mining claim, the location notice whereof was recorded in Book 1 of Mill Sites, p. 130, Union County Records, to which reference is hereby made for a further description.

28. All that certain piece or parcel of land more particularly described as follows: Beginning at a point on the half section line that is south 16.50 chains from the  $\frac{1}{4}$  section corner on the north line of said section 3; thence south 7.15 chains and tracing said half section line; thence west 7 chains, thence north 7.15 chains, thence east 7 chains to the place of beginning, containing 5 acres and being a portion of the E  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  Sec. 3 Tp. 7, S. R. 45 E. W. M., and known as Lot No. 3 situated in Baker County, (formerly Union County) Oregon, and more particularly described on p. 292 Book J of the Deeds Records of Union County, Oregon, reference to which is hereby made for further description said five acres being the same property conveyed to the estate of John E. Searles by Alexander McDonald by warranty deed dated February 14, 1902 and recorded on February 28, 1902 in Book 39 of Deeds, page 604 of the Records of Baker County, Oregon.

29. All that certain water right located by W. J. Clark and John E. Searles on August 26th, 1895, the

location notice whereof is recorded in Book E. of Water Rights, p. 70, Union County Records, to which reference is hereby made for further description.

30. All that certain water right of 200 inches of the south branch of Elk Creek located July 3, 1895, by W. J. Clark and John E. Searles, the location notice whereof was recorded in Book E. of Water Rights, page 70, Union County Records, to which reference is hereby made for a further description.

31. All that certain water right of 1000 inches of the water of Pine Creek, the location notice whereof is recorded in Book E of Water Rights, page 74, Union County Records, to which reference is hereby made for further description.

32. All those two certain water rights, the one of 100 inches of water running from the spring known as the Union Spring, situated, lying and being immediately under the Union Mine, and the other of 100 inches of water to be used and taken from Fall Creek, said water rights being adjoining and adjacent to said mining claims which were located by W. J. Burdette and which were conveyed by J. R. Farrell and wife to John E. Searles and William J. Clark by deed dated July 3rd, 1895, and which deed was on July 14th, 1896, recorded in the office of the County Clerk of Union County, Oregon, in Book C of Mining Deeds, on page 634 to which deed reference is hereby made for further description.

33. The buildings, structures, erections and constructions now placed upon any of the hereinbefore

described property with their fixtures.

Together with all the machinery for the reduction of ore, mining machinery, mining tools and equipment and personal property, and all equipment and machinery for generating power, and mineral bearing ore now actually mined and broken upon said property, and the concentrates or proceeds therefrom located at Cornucopia, or at Baker City, Oregon, or on the property known as the Cornucopia Mines Company of Oregon, or elsewhere now held; and also all the easements, property, leasehold rights and things of whatsoever name or nature now connected with or relating to the said Cornucopia Mines, together with all and singular tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title and interest, property, possession, claim and demand whatsoever as well at law as in equity of the Cornucopia Mines, in and to the same and any and every part thereof with the appurtenances. The personal property and chattels above leased or intended so to be, now held or hereafter acquired, shall be deemed real estate for all the purposes of this indenture and shall be held and taken to be fixtures and appurtenances of the said Cornucopia Mines and part thereof and are so to be used.

TO HAVE AND TO HOLD under the said lessee, for the term of twelve months from the date hereof expiring at noon on the 1st day of November A. D. 1912, unless sooner forfeited or determined through

the violation of any covenant hereinafter against the said tenant reserved.

And in consideration of such demise, the said lessee doth covenant and agree with said lessor as follows, to wit:

To not assign this lease or any interest thereunder, and not to sublet the said premises or any part thereof, without the written consent of said lessor, and not to allow any person or persons not in privity with the parties hereto, to take or hold possession of said premises, or any part thereof, under any circumstances or any pretense whatever.

To allow said lessor and its agents at any time to enter upon and into all parts of said mines and premises for purposes of inspection, or for any other purpose whatsoever.

To pay to said lessor as Royalty ninety per cent. of the net mill returns of all ore extracted or to be extracted from said mines; and said lessor is to have the sole and exclusive control and right to say to whom and how the ores extracted from said mines, and the concentrates therefrom, shall be disposed of, and said lessee will be directed solely and exclusively how said ores and concentrates shall be sold and disposed of.

To well and sufficiently timber said mines at all points where proper, and work and develop said mines in accordance with good mining.

To deliver to said lessor or its agent or agents, all the said described mines, material and premises in at

least as good condition as the same are now in at the date of this lease; and without demand or further notice of any kind or character said lessee must deliver said described mines and premises over to said lessor on the 1st day of November, 1912, at noon on said day, or any other day or time previous thereto, upon demand for violation of any provision or covenant contained in this lease, or for forfeiture thereof.

Said lessee must promptly pay for all labor and supplies of every kind and character whatsoever furnished to said lessee by any person or persons under or in privity with him used in operating and working said mines and premises under this lease; and if said wages of miners and laborers and workmen, and said supplies under this lease are not paid promptly when due from said lessee, then said lessor at its election may declare a forfeiture of this lease, and take possession of said mines and premises upon demand therefor, and immediately upon said demand being made with or without force, and with or without process of law, and may proceed against any person or persons that may be found in occupation thereof as guilty of unlawful detainer.

IN WITNESS WHEREOF the lessor has caused this instrument to be executed in its corporate name by its President, and its corporate seal to be affixed hereto and attested by its Secretary, and the lessee has hereunto set his hand and seal, all as of the 1st day of November in the year nineteen hundred and eleven.

CORNUCOPIA MINES CO.

By JOSEPH B. THOMAS, (Seal)

President.

ROBERT M. BETTS. (Seal)

Attest:

INA W. HUNTER,

Secretary.

STATE OF NEW YORK,

County of New Work,—ss.

On this 9th day of November A. D., 1911, before me personally appeared JOSEPH B. THOMAS, President of the CORNUCOPIA MINES COMPANY OF OREGON, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York, County of New York, and State of New York, that he knows the corporate seal of the CORNUCOPIA MINES COMPANY OF OREGON; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of its Board of Directors, and that by like order he signed the same as President. And on the same day and year before me personally appeared I. W. HUNTER, Secretary of the said company, to me known, who, being by me duly sworn, did depose and say that she resides in the city of East Orange, County of Essex, and State of New Jersey; that she knows the corporate seal of the Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of its Board of Directors, and that by like or-

der she attested the same as Secretary.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my notarial seal this 9th day of November, 1911.

(L. S.)

JAMES A. NELSON,  
Notary Public N. Y. Co.  
Certificate filed N. Y. Co.

STATE OF NEW YORK,

County of New York,—ss.

On this 9th day of November in the year nineteen hundred and eleven, before me personally came Joseph B. Thomas, to me known, and known to me, to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my seal, this 9th day of November, 1911.

JAMES A. NELSON,  
Notary Public N. Y. Co.  
Certificate filed N. Y. Co.

Indexed Compared. 20883.

STATE OF OREGON,

County of Baker,—ss.

I certify that the within was received and duly recorded by me in Baker County Records, Book of L. & A., Vol. G, Page 270, on the 28th day of Nov., 1911.

Filed at 10:30 o'clock a. m.

A. B. COMBS Jr.,  
Co. Clerk.

By GEO. S. KING,  
Deputy.

Filed April 11, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of September, 1913, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows, to wit:

**[Petition for Writ of Error.]**

(Title.)

Now comes Robert M. Betts, receiver of Cornucopia Mines Company of Oregon, defendant herein, and says that on the 11th day of April, 1913, a jury in the above entitled cause duly impaneled therein rendered a verdict in the sum of \$12,500.00 in favor of the plaintiff and against the defendant; and for costs and disbursements therein: which verdict and judgment was by the Court thereafter duly entered against the said defendant and in favor of the plaintiff as aforesaid.

In which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in his behalf to the United States Circuit Court of Appeals for Ninth Circuit for the cor-

rection of errors so complained of, and that a transcript of the record proceedings and papers in this cause duly authenticated may be sent to said Court of appeals.

EMMETT CALLAHAN,  
SMITH & LITTLEFIELD,  
Attorneys for Defendant.

[Endorsed]: Petition for Writ of Error. Filed  
Sep. 19, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of September, 1913, there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

**[Assignments of Error.]**

(Title.)

Now comes the defendant Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, a corporation, and in connection with his Petition for a Writ of Error in the above entitled action, says that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and defendant makes this, his

ASSIGNMENTS OF ERRORS

I.

During the trial of said action, John L. Bisher, Jr.,

was called as a witness in his own behalf and was asked the following questions:

Q. Did they furnish you with any tools?

A. Well, Mr. Harbert, Harry Harbert, gave me a pair of climbers and a belt, and a pair of pliers.

Q. The pliers, did they have insulated handles?

A. No, sir. The pair of pliers that he gave me, they were dull, and the climbers were dull, and I sent down home and got a pair that I had used in climbing telephone poles, they were sharp, and the pliers, and the belt—I wore the belt that he gave me. And the pliers I sent down home and got a pair of pliers, because those that he gave me were old, and I couldn't use them, and they were so large I couldn't hardly use them.

Q. Did you try to use the climbers that he gave you?

A. I climbed one pole with them.

Q. Why couldn't you use them?

A. They were too dull. You cannot use climbers when they are very dull. You might slip. I climbed the pole right in front of the store when we was putting the lights in the saloon.

Mr. SMITH: We move to strike out all this testimony about the climbers and the belt and the pliers, for the reason that there is no risk alleged to have been occasioned by them at all. It simply encumbers the record.

COURT: I understand they allege that he was not supplied with the proper utensils.

Mr. RICHARDSON: That is it, your Honor.

Mr. SMITH: But, if your Honor please, there is no charge he was hurt by reason of it. His charge is he was hurt by electric shock. He doesn't claim that they had anything to do with the shock.

COURT: I will overrule the objection.

Mr. SMITH: Note an exception.

That the Court erred in not granting defendant's motion to strike out all of the foregoing testimony.

## II.

During the trial of said action, Albert Smith was called as a witness in behalf of the plaintiff, and was asked the following questions:

Q. Did you hear any one give Johnnie Bisher any orders?

A. Yes, sir.

Q. On that day?

A. I heard Mr. Ed Mills tell Johnnie Bisher that What's his name?

Q. Buxton?

A. Mr. Buxton—to go down, that he wanted him on the line.

Mr. SMITH: How was that, now? State that again.

Q. Just repeat that loud enough so we can hear it.

A. Mr. Mills, Ed Mills—

Q. Who was Ed. Mills?

A. Well, he was the man that I was working under—the boss.

Q. Working under?

A. Yes, he was the boss. He was the boss at that time, that I was working under.

Q. What did he say?

A. He told Johnnie Bisher that Mr. Buxton wanted him down on the line?

Q. On what line?

A. On the electric line.

Q. Who was Mr. Buxton?

A. Well, he was the man at the powerhouse. I don't know him—don't know the man at all.

Mr. SMITH: We move to strike out the evidence as incompetent, irrelevant and immaterial.

COURT: I will overrule the motion.

Exception allowed.

Excused.

The objection was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said questions.

### III.

During the trial of said action, L. W. Sloper was called as a witness in behalf of plaintiff, and was asked the following questions:

Q. I will ask you, Mr. Sloper, if a three-phase transmission line, such as has been described by the witnesses in this case that you have heard, consisting of copper wires a little larger than a lead pencil, strung upon poles about 25 feet from the ground and on a support known as a cross-arm, such as the one

in evidence here, said transmission lines being the distance as you observe between these two insulators on this "Exhibit B-1" of both plaintiff and defendant, the cross-arm being nailed to a post about eight inches in diameter, and the third wire being placed on an insulator on this end of the cross-arm, would it be, in your opinion, safe for a repair man or any one else to make repairs, or to change these insulators, on uninsulated wires carrying a voltage of electricity as high as 2300 volts? State whether or not, in your opinion, a workman or repair man, without the use of rubber gloves, without the use of insulated handles or pliers, or any other lineman protectors, could make those changes without endangering themselves to great injury and shock by electricity?

Mr. SMITH: Objected to as invading the province of the jury, and as incompetent.

COURT: You might qualify him as an expert.

Mr. RICHARDSON: He is qualifying as an expert lineman.

COURT: Very well. I will overrule the objection.

Defendant objected to this question as invading the province of the jury and as being incompetent. The objection was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said question.

#### IV.

During the trial of said action, L. H. Kennedy was

called as a witness on behalf of the plaintiff and was asked the following questions:

Q. What is the custom of the average employer of requiring linemen to use rubber gloves?

Mr. SMITH: Objected to, as the custom is not pleaded in this case, or relied on. He cannot rely upon the statute and custom at the same time. If he wants to amend his complaint and rely on custom, he can do so.

Mr. RICHARDSON: It is not a question of relying on custom, if they failed to use the safety device, any safety device, for the purpose of protecting their employes.

COURT: I will overrule the objection. You may proceed.

Defendant objected to this question as the custom is not pleaded in this case or relied upon, and that such questions do not tend to prove any issue in this case and were not proper questions to propound to the witness. The objection was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said question.

## V.

At the conclusion and close of plaintiff's case, Mr. Richardson, counsel for plaintiff, said: "We will rest, I believe, your Honor," whereupon Mr. Smith on behalf of defendant moved for a non suit, upon the ground that the evidence of the plaintiff and his

witnesses does not show any negligence on the part of the defendant whatsoever. It shows that the plaintiff does not know how this injury occurred, and the facts of the injury are left to inference.

COURT: I will overrule the motion. You may proceed with your testimony.

Mr. SMITH: We will note an exception, your Honor.

And the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in not sustaining defendant's motion for non suit.

## VI.

That during the trial of said action, Robert M. Betts was called as a witness on behalf of the defendant, and on his cross examination by plaintiff's attorney, was asked the following questions:

Q. You didn't know that the laws of the State of Oregon required you to have your wires insulated, did you, Mr. Betts?

Mr. SMITH: Objected to as incompetent, irrelevant and immaterial. Ignorance of the law is no excuse for anybody. If it requires it, it does; if it doesn't, it don't. It is for the Court to say. It is immaterial whether he knew it or not. Men have been hung when they didn't know what the law was.

COURT: You may answer the question.

Defendant objected to the foregoing question; the objection was overruled by the Court, and the defendant then and there excepted thereto; and said ex-

ception was duly allowed by the Court.

That the Court erred in allowing said question to be answered.

## VII.

At the conclusion of the testimony of Robert M. Betts, witness on behalf of the defendant, defendant and plaintiff informed the Court that the testimony for and on behalf of the plaintiff and defendant was closed and no further testimony was given in said action. Whereupon Mr. Smith, as Attorney on behalf of the defendant, interposed a motion for a directed verdict in the following words, to-wit:

Mr. SMITH: Before proceeding, if your Honor please, to get the record, we desire to interpose a motion for a directed verdict. The defendant at this time asks the Court to instruct the Jury to return a verdict for the defendant upon the following grounds: First, the evidence shows that both plaintiff and defendant are residents, citizens and inhabitants of the State of Oregon, and this Court has no jurisdiction of the case. The bare fact that the defendant is sued as receiver in a court action, does not give this court jurisdiction where the diverse citizenship does not exist.

Second, the evidence conclusively shows that Robert M. Betts, Lessee, was operating this mine, and electrical plant at the time of the injury and not Robert M. Betts as Receiver, and that by reason of the sale of the property, the duties of the receiver had terminated.

Third, That the evidence fails to disclose any proximate cause for the injury other than the negligence of the plaintiff himself. There is no negligence of the master which is shown to have contributed in any way to the injury.

Fourth, The testimony shows that the plaintiff was a volunteer, that the master owed him no duty; that his duties did not require him to be on the pole, or among the wires; that the master did not know that he was among the wires, or on the pole, or was attempting in any way to discharge duties thereon.

Fifth, The evidence shows that the injury was occasioned solely by the negligence of the plaintiff.

COURT: The Court will overrule the motion.

Mr. SMITH: We will note an exception on the several grounds separately, if the Court please.

COURT: Very well.

The defendant's motion for a directed verdict was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in not allowing defendant's motion for a directed verdict in this action.

## VIII.

While Mr. Richardson, Attorney for Plaintiff, was making his argument to the Jury, the following occurred:

Mr. RICHARDSON: Now, gentlemen, what about Mr. Betts. When we had Mr. Betts, this lessee Betts—lessee Betts on the witness stand, that he

likes to be called. That is the title that he wants to be called. When he was on the witness stand, I asked Mr. Betts, I says, "Mr. Betts, what about these rubber gloves?" First I asked him if he was an electrician. "No." "How came you to suggest to Harry Harbert that you would give him rubber gloves? Did you have any there?" "No." "How came you to suggest it?" "Well, I just naturally thought about it. It just naturally kind of occurred to me that maybe he might want them." Now, gentlemen, there is a man that is not an electrician, a man that is not versed in the proper devices that an electric lineman needs, by his own admissions, and still he would come in here, and he would have you believe from that witness stand that he was the one that suggested about rubber gloves. Gentlemen, I will tell you, that will not hold water. That does not appeal to a man of real common ordinary intelligence as being something that a man like Betts would think. It looks like it must be a lawsuit, gentlemen, that suggested that, or an injury that suggested that. It looks like the same thought suggested that to him that suggested that he was all of a sudden, instead of being a receiver of the Cornucopia Mines Company, he was a lessee.

Mr. SMITH: We except to the remarks of counsel, and assign them as error.

Mr. RICHARDSON: Your Honor, I did not make very many interruptions, and I am drawing inferences. The jury knows that I am not stating these as facts.

COURT. I will overrule the motion. You may save an exception."

That the Court erred in overruling defendant's motion in reference to the foregoing remarks of Counsel before the Jury in said cause.

### IX.

Prior to the argument to the Jury, the defendant duly requested in writing that the Court should give to the Jury the following instructions, the same being numbered from one to thirteen inclusive, excepting therefrom instruction numbered seven which was given by the Court to the Jury as requested by defendant.

Instruction No. 1:

#### I.

Gentlemen of the Jury, You are instructed to return a verdict for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving such exception or his rights, requests the following:

Instruction No. 2:

#### II.

You are instructed that the evidence in this case does not show the proximate cause of the injury. You will therefore return a verdict for the defendant.

If the Court refuses the above instruction, the defendant excepts to such refusal, and without waiving his exception or his rights, requests the following instruction:

Instruction No. 3:

III.

You are instructed that the evidence in this case shows that the plaintiff was injured through his own negligence and not in the discharge of any duty of any kind whatsoever to the defendant. You are therefore instructed to return your verdict for the defendant.

If the Court refuses the above instruction, the defendant excepts thereto, and without waiving such exceptions or his rights, requests the following:

Instruction No. 4:

IV.

You are instructed that the evidence in this case shows that Robert M. Betts, lessee, was operating the mine and power plant at the time of the injury, and as he is not a party to this action your verdict must be for the defendant.

If the Court refuses the above instruction, the defendant excepts thereto, and without waiving his exceptions or his rights, requests the following:

Instruction No. 5:

V.

If you believe from the evidence that Johnnie Bisher, at the time he was injured, was on the pole and was not in the discharge of any duty imposed upon him, or if he was on the pole in a furtherance of his own learning or enlightenment, and his duties did not require him to go up on the pole or among the wires, then he is what is known in law as a volunteer and he cannot recover in this case and your verdict must

be for the defendant.

If the court refuses the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following:

Instruction No. 6:

## VI.

You are instructed that no person can recover damages from another for injuries inflicted by himself. If, therefore, you believe from the evidence that at the time of the injury Johnnie Bisher received the same through any carelessness of his own, or while doing an act which his duties did not require, or in any other way than through the negligence of his employer, then I instruct you that he cannot recover in this action and your verdict must be for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction: (Instruction No. VII was given by the Court as requested by defendant.)

Instruction No. 8:

## VIII.

Some testimony has been introduced as to rubber gloves and as to insulated nippers and as to body protectors.

I instruct you that the evidence fails utterly to show that the presence of insulated nippers or body protectors would have prevented the injury. You will, therefore, disregard this evidence for no negligence of any employer is ground for liability unless such

negligence caused injury.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following:

Instruction No. 1X:

IX.

As to rubber gloves, I instruct you that if you believe from the evidence that the nature or character of the work in question was such that rubber gloves were not an essential requisite, then failure to furnish them would not be negligence.

I instruct you further that if you believe from the evidence that the employer did not know that Johnnie Bisher was working on the poles or among the wires, then the master would be under no obligation to furnish him any protection.

Instruction No. X.

X.

I further instruct you that if you believe from the evidence that the master offered to or was ready and willing to furnish rubber gloves to his employees who were working among the wires, and that such employees knew it and failed to request them, then the fact that they were working without rubber gloves would be their own voluntary choice or way and the employer would not be liable for the injury and the verdict in this case would be for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following in-

struction:

Instruction No. XI.

XI.

I instruct you further that the testimony in this case shows that the defendant, Betts, is a resident, citizen and inhabitant of Oregon, and plaintiff is also a resident, citizen and inhabitant of the State of Oregon; the Court, therefore, has no jurisdiction of this case and you are directed to return a verdict for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

Instruction No. XII:

XII.

I further instruct you that the evidence in this case does not show that Harry Harbert had any right or authority to control or order Johnnie Bisher in the discharge of his duties, except such as pertained to sending up material and carrying same from pole to pole. Harry Harbert was not a foreman, he was not a person in charge of the work or any part thereof, he was not discharging any duty of the master in relation to Johnnie Bisher, and whatever Johnnie Bisher did in mounting the poles or attempting to learn the work of an electrician or attempting to do anything in or about the wires was of his own voluntary choice or selection, and he cannot recover in this action, and your verdict must be for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction :

Instruction No. XIII.

XIII.

I instruct you that the evidence shows that Johnnie Bisher knew the current was on these wires, also the volume of voltage and that said wires were alive, and if you believe that his duties as supply boy did not require him to work among the wires or on the poles but that he was acting outside his duties as supply boy, then I instruct you that he assumed the risk of danger, and if he was injured outside the scope of his duties as supply boy then he assumed the risk of the injury and he cannot recover, and your verdict must be for the defendant.

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The Court refused to give such foregoing instructions to the jury, numbered one to thirteen inclusive, excepting therefrom said instruction numbered seven which was given by the Court as requested by the defendant ; and the defendant, prior to the retiring of the jury for deliberation, duly excepted to the action of the Court in refusing to give said foregoing instructions numbered from one to thirteen inclusive, excepting therefrom instruction numbered seven, which was given to the jury ; and said exceptions were then and there allowed to each of said foregoing instructions.

That the Court erred in refusing to give said foregoing instructions to the jury as requested by the defendant.

X.

That the Court erred in allowing said cause to be submitted to the jury for the reason that there is no evidence showing that John L. Bisher was or is the guardian ad litem of John L. Bisher, Jr.

XI.

That the District Court erred in overruling defendant's motion for a new trial, which is as follows:

**[Motion for New Trial.]**

*"In the District Court of the United States for the  
District of Oregon.*

JOHN L. BISHER, Jr., by JOHN L. BISHER, his  
Guardian ad litem,

Plaintiff,

vs.

THE CORNUCOPIA MINES CO. OF OREGON,  
a corporation, and ROBERT M. BETTS, Re-  
ceiver of Cornucopia Mines Company of Ore-  
gon.

"Now comes the defendant Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, a corporation, and moves the court to set aside the verdict of the jury and judgment entered thereon in this cause, and to grant him a new trial herein for the following reasons:—

I.

Court erred in overruling defendant's motion for

non-suit.

II.

Court erred in overruling and refusing to grant defendant's motion for directed verdict at the close of all of the testimony on all the grounds stated in said motion, and on each ground severally.

III.

The verdict of the jury is contrary to the law and against the evidence.

IV.

That said verdict is against the clear weight of the evidence given at the trial.

V.

Error in law occurring at the trial of said action and excepted to by the defendant at the trial.

VI.

Excessive judgment and damages given against defendant and in favor of plaintiff which was given under the influence of sympathy, passion and prejudice.

VII.

That said verdict and judgment was against the law and contrary to the instructions as to the law given to the jury by the Court.

VIII.

That the Court erred in refusing to give the instructions as to the law in the case requested by the defendant, and excepted to at the trial of said action.

IX.

This motion will be based upon the records and files in the above cause; the minutes of the court and

the Bill of exceptions which is to be hereafter prepared and served upon the attorney for plaintiff herein, which Bill of Exceptions will contain also a full transcript of the testimony as taken and extended by the official stenographer of the above named court.

(Signed) SMITH & LITTLEFIELD,  
EMMETT CALLAHAN,  
Attorneys for Defendant."

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## XII.

The said District Court erred in rendering judgment in favor of the plaintiff and against the defendant for the reason that the same is contrary to the law and the evidence.

WHEREFORE, the said defendant, plaintiff in error, prays that the judgment of the District Court of the United States for the District of Oregon in the above entitled cause be reversed, and that the said District Court be directed to grant a new trial of said cause.

EMMETT CALLAHAN,  
SMITH & LITTLEFIELD,  
Attorneys for Defendant.

[Endorsed]: Assignment of Errors. Filed Sep. 19, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of September, 1913, there was duly filed in said Court, an Order Allowing Writ of Error, in words and figures as follows, to wit:

[Order Allowing Writ of Error.]

*In the District Court of the United States for the  
District of Oregon.*

JOHN L. BISHER, Jr., by JOHN L. BISHER, his  
guardian ad litem,

Plaintiff,

vs.

THE CORNUCOPIA MINES COMPANY OF  
OREGON, a corporation, and ROBERT M.  
BETTS, Receiver of said Cornucopia Mines  
Company of Oregon,

Defendants.

On this 24 day of September, 1913, came the above named defendant by Emmett Callahan and Smith and Littlefield, his Attorneys, and file herein and present to the Court its Petition praying for the allowance of a Writ of Error intended to be urged by the defendant, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on the 11th day of April, 1913, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may appear in the premises. Upon consideration hereof, the Court does allow the Writ of Error, the Supersedes bond, if such bond is given by said defendant, to be in the sum of Thirteen Thousand (\$13,000.00) Dollars.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Order allowing Writ of Error. Filed Sep. 19, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of September, 1913, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

**[Bond on Writ of Error.]**

*In the District Court of the United States for the  
District of Oregon.*

JOHN L. BISHAR, Jr., by JOHN L. BISHAR, his  
Guardian ad litem,

Plaintiff,

vs.

ROBERT M. BETTS, Receiver of Cornucopia Mines  
Company of Oregon,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we the above named defendant, Robert M. Betts, Receiver of Cornucopia Mines Company of Oregon, a corporation duly organized under the Laws of the State of Maine, and doing business as such corporation in the State of Oregon, as principal, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation duly organized and existing under the laws of the State of New York, and duly licensed as such corporation under the laws of the State of Oregon, for the purpose of making, guaran-

teeing, and becoming sole surety upon bonds and undertakings, does hereby undertake as surety, and is held firmly bound unto the above named plaintiff, John L. Bisher, Jr. by John L. Bisher, his guardian ad litem, in the sum of Two-thousand dollars, for the payment whereof well and truly to be made unto the said plaintiff above named, said Robert M. Betts, receiver Cornucopia Mines Company of Oregon, a corporation and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, bind themselves, their successors and assigns jointly and severally by these presents.

Whereas, lately at a term of the District Court of the United States for the District of Oregon in an action pending in said Court between John L. Bisher, Jr. by John L. Bisher, his guardian ad litem, as plaintiff, and Robert M. Betts, receiver Cornucopia Mines Company of Oregon, a corporation, as defendant, a judgment was rendered against said defendant and in favor of said plaintiff, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of said Court to reverse the judgment in the aforesaid suit and a citation directed to the said plaintiff and admonishing him to be and appear at the next session of the United States Circuit Court of Appeals for the Ninth Circuit.

Now, therefore, the condition of the above obligation is such that if the above named defendant, Robert M. Betts, receiver Cornucopia Mines Company of Oregon shall prosecute said writ of error to effect and

pay all costs incurred herein, then the above obligation is to be void; otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF the said Robert M. Betts, Receiver Cornucopia Mines Company of Oregon, a corporation, and the AMERICAN SURETY COMPANY OF NEW YORK, a corporation, have caused these presents to be executed this 25th day of September, 1913.

(Sd) ROBERT M. BETTS,  
Receiver Cornucopia Mines Com-  
pany of Oregon, a corporation, by  
(Sd) EMMETT CALLAHAN,  
Attorney for Receiver.

AMERICAN SURETY COMPANY  
OF NEW YORK,

By JOHN K. KOLLOCK,  
Resident Vice-President.

Attest: W. J. LYONS,  
Resident Assistant Secretary.

Examined and approved this 25th day of September, 1913.

(Sd) CHAS. E. WOLVERTON,  
Judge.

[Endorsed]: Undertaking on Writ of Error. Filed September 25th, 1913.

A. M. CANNON,  
Clerk.

And afterwards, to wit, on the 26 day of September,

1913, there was duly filed in said Court, a Writ of Error, in words and figures as follows, to wit:

**[Writ of Error.]**

*In the United States Circuit Court of Appeals  
for the Ninth District.*

ROBERT M. BETTS, Receiver of Cornucopia Mines  
Company of Oregon,

Plaintiff in Error,

vs.

JOHN L. BISHER, Jr., by JOHN L. BISHER, his  
guardian ad litem,

Defendant in Error.

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THE UNITED STATES OF AMERICA, ss.

The President of the United States of America.

To the Judge of the District Court of the United  
States for the District of Oregon: Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable CHAS. E. WOLVERTON, one of you, between John L. Bisher, Jr. by guardian, Plaintiff and Defendant in Error, and Robt. M. Betts, Receiver of Cornucopia Mines of Oregon, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command

you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD  
DOUGLAS WHITE,

Chief Justice of the Supreme Court of the  
United States this 26 day of September,  
1913.

(L. S.)

A. M. CANNON,  
Clerk of the District Court of the United  
States for the District of Oregon.

[Endorsed]: Writ of Error. Filed Sep. 26, 1913.

A. M. CANNON,  
Clerk.

And afterwards, to wit, on the 6th day of October, 1913, there was duly filed in said Court, a Citation on Writ of Error, in words and figures as follows, to wit:

[Citation on Writ of Error.]

UNITED STATES OF AMERICA,

District of Oregon,—ss.

To John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 26th day of September in the year of our Lord, one thousand, nine hundred and thirteen.

CHAS. E. WOLVERTON,

Judge.

Due service of the within citation by copy admitted October 6, 1913.

BOOTHE & RICHARDSON,

Attys. for Plaintiff.

[Endorsed]: Citation on Writ of Error. Filed Oct. 6, 1913.

A. M. CANNON,

Clerk.

And afterwards, to wit, on Tuesday, the 30 day of September, 1913, the same being the ..... Judicial day of the Regular July 1913 Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Order Enlarging Time to File Transcript.]**

(Title.)

No. 5784

September 30, 1913.

Now, at this day, good cause shown, it is Ordered that Defendant's time for filing the record and docketing this cause on the appeal thereof in the United Circuit Court of Appeals for the Ninth Circuit be and hereby is enlarged and extended ninety days from the 1st day of October, 1913.

CHAS. E. WOLVERTON,

Judge.

And afterwards, to wit, on the 10 day of October, 1913, there was duly filed in said Court, an Order in words and figures as follows, to wit:

**[Order Certifying Up Original Exhibits.]**

(Title.)

Now at this day, it appearing that certain exhibits introduced at the trial of this cause in this Court are of such nature as to require inspection by the Appel-

late Court on the appeal of this cause to the United States Circuit Court of Appeals, Ninth Circuit;

IT IS ORDERED that there be certified up with the record to the said United States Circuit Court of Appeals on said appeal plaintiff's exhibits "One" and "Two," and defendant's exhibits "A," "B," "C," "D," "E" and "F."

R. S. BEAN,  
Judge.



2  
No.

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IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT.

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ROBERT M. BETTS, Receiver of the Cornucopia  
Mines Company of Oregon,  
Plaintiff in Error.

vs.

JOHN L. BISHER, Jr., by JOHN L. BISHER, his  
Guardian,  
Defendant in Error.

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**Brief on Behalf of Plaintiff in Error.**

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EMMETT CALLAHAN,  
SMITH & LITTLEFIELD,  
Attorneys for Plaintiff in Error.

BOOTH & RICHARDSON,  
Attorneys for Defendant in Error.

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## STATEMENT OF THE CASE.

This is an action for damages by John L. Bisher, Jr., by John L. Bisher, as guardian ad litem, to recover for injuries alleged to have been sustained by complainant while employed by appellant, Robert M. Betts, as Receiver of Cornucopia Mines Company of Oregon, on July 29, 1911, which injuries it is alleged were due to the negligence of appellant. Among other things, it is asserted that appellant was engaged in operating mines in connection with which a certain electrical plant for generating and transmitting electricity for use therein was operated; which electricity was transmitted over three copper wires from the generating plant to the mines, and that these wires were stretched upon poles about twenty feet from the ground; and that upon the same poles was a certain telephone wire located about seven feet below the electric wires.

The grounds upon which recovery is sought are,  
That the appellant:

1st. Failed to insulate the transmission wires at the poles and arms upon which they were tied.

2nd. Was negligent in not leaving sufficient space between the wires so that a workman could safely work between them or between the poles and wires.

3rd. Placed a dead wire with the live wires in placing the telephone wire below the live copper wires.

4th. Failed to designate the arms and poles upon which live wires were located, by colors so they might be known and observed by complainant.

5th. Failed to use due care and precaution toward complainant and other employees and failed to supply them with proper tools and implements and to give them proper instructions and directions while working about said wires.

6th. Directed respondent (complainant) to do and perform his work in an unsafe and dangerous place while respondent was ignorant of the danger, and without instructing him thereof.

7th. Directed respondent to climb and work upon poles without furnishing him with a ladder or proper appliances for the performance of such work.

8th. Failed to turn off the live electrical current while the work of putting on new insulators on cross-pieces was being done on the poles.

The appellant in his answer denies:

1st. That Bisher was employed by him, as receiver, but avers that Bisher was employed by Betts, as lessee of the said mines and electric power and generating plant, and that Betts, as such lessee, was operating the mines and plant at all times when Bisher was working for him, and that Bisher had full knowledge that he was so employed by Betts, as lessee, and not as receiver.

Appellant affirmatively alleges that Bisher was employed by Betts, as lessee, to carry tools; that his

employment required him only to carry tools and supplies along the ground and did not require him to climb poles or assist in adjusting any instrumentalities upon the poles or cross-pieces; that the wire and supplies which Bisher was to carry along the ground were used by a lineman in rehabilitating the transmission lines; that appellant used every reasonable care and precaution in the construction of such line and providing for the care and safety of his employees engaged therein.

That Bisher had no work or duties to perform upon the poles in constructing and tying the copper wires to the insulators or in adjusting the insulators on the pegs; that when Bisher ascended the said poles, as alleged in the complaint, he voluntarily did so, and such act was outside and beyond his scope of employment and instructions; that his employment required him to work upon the ground in carrying wires, etc.; that he was not to do or perform any work in or about the electrical wires, or to ascend any poles, or to work about or in the vicinity of any wires whatsoever except the disconnected tie wires which he carried over the ground, and that his employment did not require him to go into any unsafe or dangerous place; that he was a volunteer.

That in climbing the poles and working among live wires, the respondent was pursuing objects and purposes of his own in trying to learn the electrical business, and knew that the current was on the wires and knew the dangers of working among them, and assumed the risk of such voluntary work.

As a further defense, the appellant alleges that the act or statute of the Oregon law upon which respondent based his right to recover damages, which act was adopted by the initiative vote of the people of the State of Oregon, is unconstitutional, in this: That it deprives the master of the defense of contributory negligence.

At the trial, evidence was adduced by the respective parties, and during the progress thereof various exceptions were taken which are specified in the transcript and which are now stated in the following.

### **SPECIFICATIONS OF ERRORS.**

The following are the specifications of errors relied upon by plaintiff in error and which are intended to be urged by him upon the writ of error as grounds for reversal of said judgment in the District Court herein. This specification of errors is the same as the assignment of errors. (Transcript of Record, pages 374 to 392 inclusive.)

(Title)

Now comes the defendant Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, a corporation, and in connection with his Petition for a Writ of Error in the above entitled action, says that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and defendant makes this, his

## ASSIGNMENTS OF ERRORS

## I.

During the trial of said action, John L. Bisher, Jr., was called as a witness in his own behalf and was asked the following questions:

Q. Did they furnish you with any tools?

A. Well, Mr. Harbert, Harry Harbert, gave me a pair of climbers and a belt, and a pair of pliers.

Q. The pliers, did they have insulated handles?

A. No, sir. The pair of pliers that he gave me, they were dull, and the climbers were dull, and I sent down home and got a pair that I had used in climbing telephone poles, they were sharp, and the pliers, and the belt—I wore the belt that he gave me. And the pliers I sent down home and got a pair of pliers, because those that he gave me were old, and I couldn't use them, and they were so large I couldn't hardly use them.

Q. Did you try to use the climbers that he gave you?

A. I climbed one pole with them.

Q. Why couldn't you use them?

A. They were too dull. You cannot use climbers when they are very dull. You might slip. I climbed the pole right in front of the store when we was putting the lights in the saloon.

Mr. SMITH: We move to strike out all this testimony about the climbers and the belt and the pliers, for the reason that there is no risk alleged to have

been occasioned by them at all. It simply encumbers the record.

COURT: I understand they allege that he was not supplied with the proper utensils.

Mr. RICHARDSON: That is it, your Honor.

Mr. SMITH: But, if your Honor please, there is no charge he was hurt by reason of it. His charge is he was hurt by electric shock. He doesn't claim that they had anything to do with the shock.

COURT: I will overrule the objection.

Mr. SMITH: Note an exception.

That the Court erred in not granting defendant's motion to strike out all of the foregoing testimony.

## II.

During the trial of said action, Albert Smith was called as a witness in behalf of the plaintiff, and was asked the following questions:

Q. Did you hear any one give Johnnie Bisher any orders?

A. Yes, sir.

Q. On that day?

A. I heard Mr. Ed Mills tell Johnnie Bisher that What's his name?

Q. Buxton?

A. Mr. Buxton—to go down, that he wanted him on the line.

Mr. SMITH: How was that, now? State that again.

Q. Just repeat that loud enough so we can hear it.

A. Mr. Mills, Ed Mills —

Q. Who was Ed Mills?

A. Well, he was the man that I was working under—the boss.

Q. Working under?

A. Yes, he was the boss. He was the boss at that time, that I was working under.

Q. What did he say?

A. He told Johnnie Bisher that Mr. Buxton wanted him down on the line?

Q. On what line?

A. On the electric line.

Q. Who was Mr. Buxton?

A. Well, he was the man at the powerhouse. I don't know him—don't know the man at all.

Mr. SMITH: We move to strike out the evidence as incompetent, irrelevant and immaterial.

COURT: I will overrule the motion.

Exception allowed.

Excused.

The objection was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said questions.

### III.

During the trial of said action, L. W. Sloper was

called as a witness in behalf of plaintiff, and was asked the following questions:

Q. I will ask you, Mr. Sloper, if a three-phase transmission line, such as has been described by the witnesses in this case that you have heard, consisting of copper wires a little larger than a lead pencil, strung upon poles about 25 feet from the ground and on a support known as a cross-arm, such as the one in evidence here, said transmission lines being the distance as you observe between these two insulators on this "Exhibit B-1" of both plaintiff and defendant, the cross-arm being nailed to a post about eight inches in diameter, and the third wire being placed on an insulator on this end of the cross-arm, would it be, in your opinion, safe for a repair man or any one else to make repairs, or to change these insulators, on uninsulated wires carrying a voltage of electricity as high as 2300 volts? State whether or not, in your opinion, a workman or repair man, without the use of rubber gloves, without the use of insulated handles or pliers, or any other lineman protectors, could make those changes without endangering themselves to great injury and shock by electricity?

Mr. SMITH: Objected to as invading the province of the jury, and as incompetent.

COURT: You might qualify him as an expert.

Mr. RICHARDSON: He is qualifying as an expert lineman.

COURT: Very well. I will overrule the objection.

Defendant objected to this question as invading the province of the jury and as being incompetent. The objection was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said question.

#### IV.

During the trial of said action, L. H. Kennedy was called as a witness on behalf of the plaintiff and was asked the following questions:

Q. What is the custom of the average employer of requiring linemen to use rubber gloves?

Mr. SMITH: Objected to, as the custom is not pleaded in this case, or relied on. He cannot rely upon the statute and custom at the same time. If he wants to amend his complaint and rely on custom, he can do so.

Mr. RICHARDSON: It is not a question of relying on custom, if they failed to use the safety device, any safety device, for the purpose of protecting their employes.

COURT: I will overrule the objection. You may proceed.

Defendant objected to this question as the custom is not pleaded in this case or relied upon, and that such questions do not tend to prove any issue in this case and were not proper questions to propound to the witness. The objection was overruled by the

Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said question.

## V.

At the conclusion and close of plaintiff's case, Mr. Richardson, counsel for plaintiff, said: "We will rest, I believe, your Honor," whereupon Mr. Smith on behalf of defendant moved for a non suit, upon the ground that the evidence of the plaintiff and his witnesses does not show any negligence on the part of the defendant whatsoever. It shows that the plaintiff does not know how this injury occurred, and the facts of the injury are left to inference.

COURT: I will overrule the motion. You may proceed with your testimony.

Mr. SMITH.: We will note an exception, your Honor.

And the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in not sustaining defendant's motion for non suit.

## VI.

That during the trial of said action, Robert M. Betts was called as a witness on behalf of the defendant, and on his cross-examination by plaintiff's attorney, was asked the following questions:

Q. You didn't know that the laws of the State of Oregon required you to have your wires insulated, did you, Mr. Betts?

Mr. SMITH: Objected to as incompetent, irrelevant and immaterial. Ignorance of the law is no excuse for anybody. If it requires it, it does; if it doesn't, it don't. It is for the Court to say. It is immaterial whether he knew it or not. Men have been hung when they didn't know what the law was.

COURT: You may answer the question.

Defendant objected to the foregoing question; the objection was overruled by the Court, and the defendant then and there excepted thereto; and said exception was duly allowed by the Court.

That the Court erred in allowing said question to be answered.

## VII.

At the conclusion of the testimony of Robert M. Betts, witness on behalf of the defendant, defendant and plaintiff informed the Court that the testimony for and on behalf of the plaintiff and defendant was closed and no further testimony was given in said action. Whereupon Mr. Smith, as attorney on behalf of the defendant, interposed a motion for a directed verdict in the following words, to-wit:

Mr. SMITH: Before proceeding, if your Honor please, to get the record, we desire to interpose a motion for a directed verdict. The defendant at this time asks the Court to instruct the jury to return a

verdict for the defendant upon the following grounds: First, the evidence shows that both plaintiff and defendants are residents, citizens and inhabitants of the State of Oregon, and this Court has no jurisdiction of the case. The bare fact that the defendant is sued as receiver in a court action, does not give this court jurisdiction where the diverse citizenship does not exist.

Second, the evidence conclusively shows that Robert M. Betts, Lessee, was operating this mine, and electrical plant at the time of the injury and not Robert M. Betts as Receiver, and that by reason of the sale of the property, the duties of the receiver had terminated.

Third, that the evidence fails to disclose any proximate cause for the injury other than the negligence of the plaintiff himself. There is no negligence of the master which is shown to have contributed in any way to the injury.

Fourth, The testimony shows that the plaintiff was a volunteer, that the master owed him no duty; that his duties did not require him to be on the pole, or among the wires; that the master did not know that he was among the wires, or on the pole, or was attempting in any way to discharge duties thereon.

Fifth, The evidence shows that the injury was occasioned solely by the negligence of the plaintiff.

COURT: The Court will overrule the motion.

Mr. SMITH: We will note an exception on the several grounds separately, if the Court please.

COURT: Very well.

The defendant's motion for a directed verdict was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in not allowing defendant's motion for a directed verdict in this action.

### VIII.

While Mr. Richardson, attorney for plaintiff, was making this argument to the jury, the following occurred:

MR. RICHARDSON: Now, gentlemen, what about Mr. Betts? When we had Mr. Betts, this lessee Betts—lessee Betts on the witness stand, that he likes to be called. That is the title that he wants to be called. When he was on the witness stand, I asked Mr. Betts, I says, "Mr. Betts, what about these rubber gloves?" First I asked him if he was an electrician. "No." "How came you to suggest to Harry Harbert that you would give him rubber gloves? Did you have any there?" "No." "How came you to suggest it?" "Well, I just naturally thought about it. It just naturally kind of occurred to me that maybe he might want them." Now, gentlemen, there is a man that is not an electrician, a man that is not versed in the proper devices that an electric lineman needs, by his own admissions, and still he would come in here, and he would have you believe from that witness stand that he was the one that suggested

about rubber gloves. Gentlemen, I will tell you, that will not hold water. That does not appeal to a man of real common ordinary intelligence as being something that a man like Betts would think. It looks like it must be a lawsuit, gentlemen, that suggested that, or an injury that suggested that. It looks like the same thought suggested that to him that suggested that he was all of a sudden, instead of being a receiver of the Cornucopia Mines Company, he was a lessee.

MR. SMITH: We except to the remarks of counsel, and assign them as error.

MR. RICHARDSON: Your Honor, I did not make very many interruptions, and I am drawing inferences. The jury knows that I am not stating these as facts.

COURT: I will overrule the motion. You may save an exception.

That the Court erred in overruling defendant's motion in reference to the foregoing remarks of counsel before the jury in said cause.

## IX.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instructions, the same being numbered from one to thirteen inclusive, excepting therefrom instruction numbered seven which was given by the Court to the jury as requested by defendant.

## Instruction No. 1:

## I.

Gentlemen of the Jury, You are instructed to return a verdict for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving such exception or his rights, requests the following:

## Instruction No. 2:

## II.

You are instructed that the evidence in this case does not show the proximate cause of the injury. You will therefore return a verdict for the defendant.

If the Court refuses the above instruction, the defendant excepts to such refusal, and without waiving his exception or his rights, requests the following instruction:

## Instruction No. 3:

## III.

You are instructed that the evidence in this case shows that the plaintiff was injured through his own negligence and not in the discharge of any duty of any kind whatsoever to the defendant. You are therefore instructed to return your verdict for the defendant.

If the Court refuses the above instruction, the defendant excepts thereto, and without waiving such exceptions or his rights, requests the following:

## Instruction No. 4:

## IV.

You are instructed that the evidence in this case shows that Robert M. Betts, lessee, was operating the mine and power plant at the time of the injury, and as he is a party to this action your verdict must be for the defendant.

If the Court refuses the above instruction, the defendant excepts thereto, and without waiving his exceptions or his rights, requests the following:

## Instruction No. 5:

## V.

If you believe from the evidence that Johnnie Bisher, at the time he was injured, was on the pole and was not in the discharge of any duty imposed upon him, or if he was on the pole in a furtherance of his own learning or enlightenment, and his duties did not require him to go up on the pole or among the wires, then he is what is known in law as a volunteer and he cannot recover in this case and your verdict must be for the defendant.

If the Court refuses to give the above instruction, defendant excepts thereto, and without waiving his exception or his rights, requests the following:

## Instruction No. 6:

## VI.

You are instructed that no person can recover damages from another for injuries inflicted by himself. If, therefore, you believe from the evidence that at

the time of the injury Johnnie Bisher received the same through any carelessness of his own, or while doing an act which his duties did not require, or in any other way than through the negligence of his employer, then I instruct you that he cannot recover in this action and your verdict must be for the defendant.

If th Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction: (Instruction No. VII was given by the Court as requested by defendant.)

Instruction No. 8:

#### VIII.

Some testimony has been introduced as to rubber gloves and as to insulated nippers and as to body protectors.

I instruct you that the evidence fails utterly to show that the presence of insulated nippers or body protectors would have prevented the injury. You will, therefore, disregard this evidence for no negligence of any employer is ground for liability unless such negligence caused injury.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following:

Instruction No. 9:

#### IX.

As to rubber gloves, I instruct you that if you believe from the evidence that the nature or character

of the work in question was such that rubber gloves were not an essential requisite, then failure to furnish them would not be negligence.

I instruct you further that if you believe from the evidence that the employer did not know that Johnnie Bisher was working on the poles or among the wires, then the master would be under no obligation to furnish him any protection.

Instruction No. 10:

X.

I further instruct you that if you believe from the evidence that the master offered to or was ready and willing to furnish rubber gloves to his employes who were working among the wires, and that such employes knew it and failed to request them, then the fact that they were working without rubber gloves would be their own voluntary choice or way and the employer would not be liable for the injury and the verdict in this case would be for the defendant.

If the Court refuses to give th above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

Instruction No. 11:

XI.

I instruct you further that the testimony in this case shows that the defendant, Betts, is a resident, citizen and inhabitant of Oregon, and plaintiff is also

a resident, citizen and inhabitant of the State of Oregon; the Court, therefore, has no jurisdiction of this case and you are directed to return a verdict for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

Instruction No. 12:

## XII.

I further instruct you that the evidence in this case does not show that Harry Harbert had any right or authority to control or order Johnnie Bisher in the discharge of his duties, except such as pertained to sending up material and carrying the same from pole to pole. Harry Harbert was not a foreman, he was not a person in charge of the work or any part thereof, he was not discharging any duty of the master in relation to Johnnie Bisher, and whatever Johnnie Bisher did in mounting the poles or attempting to learn the work of an electrician or attempting to do anything in or about the wires was of his own voluntary choice or selection, and he cannot recover in this action, and your verdict must be for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

## Instruction No. 13:

## XIII.

I instruct you that the evidence shows that Johnnie Bisher knew the current was on these wires, also the volume of voltage and that said wires were alive, and if you believe that his duties as supply boy did not require him to work among the wires or on the poles, but that he was acting outside his duties as supply boy, then I instruct you that he assumed the risk of danger, and if he was injured outside the scope of his duties as supply boy then he assumed the risk of the injury and he cannot recover, and your verdict must be for the defendant.

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The Court refused to give such foregoing instructions to the jury, numbered one to thirteen inclusive, excepting therefrom said instruction numbered seven which was given by the Court as requested by the defendant; and the defendant, prior to the retiring of the jury for deliberation, duly excepted to the action of the Court in refusing to give said foregoing instructions numbered from one to thirteen inclusive, excepting therefrom instruction numbered seven, which was given to the jury; and said exceptions were then and there allowed to each of said foregoing instructions.

That the Court erred in refusing to give said foregoing instructions to the jury as requested by the defendant.

## X.

That the Court erred in allowing said cause to be submitted to the jury for the reason that there is no evidence showing that John L. Bisher was or is the guardian ad litem of John L. Bisher, Jr.

## XI.

That the District Court erred in overruling defendant's motion for a new trial, which is as follows:

**(Motion for New Trial.)**

“In the District Court of the United States for the  
District of Oregon.

JOHN L. BISHER, Jr., by JOHN L. BISHER, his  
Guardian ad litem,

Plaintiff,

vs.

THE CORNUCOPIA MINES CO. OF OREGON,  
a corporation, and ROBERT M. BETTS, Re-  
ceiver of Cornucopia Mines Company of Ore-  
gon.

“Now comes the defendant Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, a corporation, and moves the Court to set aside the verdict of the jury and judgment entered thereon in this cause, and to grant him a new trial herein for the following reasons:—

## I.

Court erred in overruling defendant's motion for non-suit.

## II.

Court erred in overruling and refusing to grant defendant's motion for directed verdict at the close of all of the testimony on all the grounds stated in said motion, and on each ground separately.

## III.

The verdict of the jury is contrary to the law and against the evidence.

## IV.

That said verdict is against the clear weight of the evidence given at the trial.

## V.

Error in law occurring at the trial of said action and excepted to by the defendant at the trial.

## VI.

Excessive judgment and damages given against defendant and in favor of plaintiff which was given under the influence of sympathy, passion and prejudice.

## VII.

That said verdict and judgment was against the law and contrary to the instructions as to the law given to the jury by the Court.

## VIII.

That the Court erred in refusing to give the instructions as to the law in the case requested by the defendant, and excepted to at the trial of said action.

## IX.

This motion will be based upon the records and files in the above cause; the minutes of the Court and the Bill of Exceptions which is to be hereafter prepared and served upon the attorney for plaintiff herein, which Bill of Exceptions will contain also a full transcript of the testimony as taken and extended by the official stenographer of the above-named Court.

## X.

The said District Court erred in rendering judgment in favor of the plaintiff and against the defendant for the reason that the same is contrary to the law and the evidence.

(Endorsed): Assignment of Errors. Filed Sept. 19, 1913.

WHEREFORE, the said defendant, plaintiff in error, prays that the judgment of the District Court of the United States for the District of Oregon in the above-entitled cause be reversed and same dismissed.

EMMETT CALLAHAN,  
SMITH & LITTLEFIELD,  
Attorneys for Plaintiff in Error.

## ARGUMENT.

At the conclusion of all the testimony on behalf of the Complainant and Respondent, Mr. Richardson, as Attorney for Complainant, notified the Court that was all his case. Whereupon Appellant interposed

his motion for a directed verdict. (Transcript of Testimony, p. 336, et sequor.)

“MR. SMITH: Before proceeding, if your Honor please, to get the record, we desire to interpose a motion for a directed verdict. The defendant at this time asks the Court to instruct the jury to return a verdict for the defendant upon the following grounds: First, the evidence shows that both plaintiff and defendant are residents, citizens and inhabitants of the State of Oregon, and this Court has no jurisdiction of the case. The bare fact that the defendant is sued as receiver in a court action, does not give this Court jurisdiction where the diverse citizenship does not exist.

“Second, the evidence conclusively shows that Robert M. Betts, lessee, was operating this mine, and electrical plant at the time of the injury and not Robert M. Betts, as receiver, and that by reason of the sale of the property, the duties of the receiver had terminated.

“Third, That the evidence fails to disclose any proximate cause for the injury other than the negligence of the plaintiff himself. There is no negligence of the master which is shown to have contributed in any way to the injury.

“Fourth, the testimony shows that the plaintiff was a volunteer, that the master owed him no duty; that his duties did not require him to be on the pole, or among the wires; that the master did not know that he was among the wires, or on the pole, or was attempting in any way to discharge duties thereon.

“Fifth, the evidence shows that the injury was occasioned solely by the negligence of the plaintiff.”

COURT: The Court will overrule the motion.

MR. SMITH: We will note an exception on the several grounds separately, if the Court please.

Mr. Richardson, counsel for Complainant (Bisher), stated:

“There is not any attempt on the part of the plaintiff in this case, by the service of any summons to hold anybody, to charge anyone with negligence, or to bring this action, or to prosecute this action against any one except Robert M. Betts, receiver of Cornucopia Mines Company of Oregon.”

COURT: You sue him as receiver?

MR. RICHARDSON: Sue him as receiver, and him alone.

COURT: I understand, you do not sue him personally?

MR. RICHARDSON: No, your Honor, not personally. (Transcript of Record, p. 40.)

Mr. Betts, the Appellant, as a witness on direct examination, testified (Page 303, Transcript of Record, et sequor):

Q. Where do you reside, Mr. Betts?

A. At Cornucopia.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. Native born?

A. Yes, sir.

Q. And a resident and citizen and inhabitant of the State of Oregon, are you?

A. Yes, sir.

Q. You are the man who is named as defendant by being receiver of the Cornucopia Mines?

A. Yes, sir.

Witness testified page 304:

Q. Now, at the time of this injury, you were operating the mines there, were you?

A. Yes, sir.

Q. In what capacity?

A. As Lessee.

Q. I will show you this document, dated the first day of November, 1911.

COURT: Is that the first day of November? I think the answer says the ninth.

MR. SMITH: The certificate of acknowledgment is the ninth.

A. It was signed on the ninth.

Q. The certificate is the ninth. I didn't notice that before. This lease dated the first day of November, 1911, and acknowledged on the 9th day bby Mr. Thomas—the lease being signed by the Cornucopia Mines Company by Joseph B. Thomas, president, and Robert M. Betts—you signed it?

A. Yes, sir.

Q. The lease being executed by the Cornucopia Mines Company by Joseph B. Thomas, president, attested by Ina W. Hunter, secretary, and also signed

by you. You are the same person named in this lease?

A. Yes.

MR. SMITH: We will offer the lease, together with the date of recording as appears from the endorsement on it.

Witness testified page 306:

COURT: This lease was made prior to the time the receiver was appointed?

MR. SMITH: Yes. It was made the first day of November, 1911, and executed the ninth.

COURT: When was the receiver appointed.

A. The 21st of December.

MR. CALLAHAN: The receiver was appointed December 21, 1911.

MR. SMITH: The lease was both executed and recorded long prior to that time, when Mr. Betts was not a party to the proceedingg.

Page 307.

COURT: I will admit this lease and dispose of the other question afterwards. It might be necessary to submit that question to a jury to determine whether they were operating under this lease or under the receivership.

MR. SMITH: We will offer the lease in evidence, together with the endorsement of recording.

MR. RICHARDSON: We will save our exception.

Marked "DEFENDANT'S EXHIBIT "G."

Witness testified, page 308:

Q. I will show you this document, marked for identification "Defendant's Exhibit A," the one which Johnnie Bisher admits he signed. That is one of the documents you received, is it, Mr. Betts?

A. Yes, sir.

Q. For what period is that a receipt of labor?

A. That is for the month of July.

MR. SMITH: We will offer in evidence this document, if your Honor please.

COURT: Do you object to that?

Complainant's counsel here objected to the introduction of Defendant's Exhibit "A."

COURT: Your objection will be overruled. You may have your exception.

Marked "DEFENDANT'S EXHIBIT A."

Page 309:

MR. RICHARDSON: This says the "Cornucopia Mines Company of Oregon to Mills, Bisher, Smith and Mills. Robert M. Betts, Lessee," stamped in there; no signature, but stamped.

COURT: I understand the boy admits his signature to that.

MR. RICHARDSON: He admitted that was his signature, but he didn't admit that there was any lessee on there, your Honor. He denies that was on there when he signed his name.

COURT: The jury heard that.

MR. SMITH: He didn't deny that it was on there. He said he didn't see it.

Q. Now, I will ask you, Mr. Betts, at the time that was signed, if that stamp was on there, "Robert M. Betts, Lessee"?

A. Yes, sir.

Witness testified, page 310:

MR. SMITH: The document down here says, "Robert M. Betts, Lessee," instead of Cornucopia Mines Company, and it is headed "To Mills, Bisher, Smith and Mills, of Cornucopia, Oregon. Contract for sacking concentrates and slimes." So many sacks, so much money—carrying it out. The date is "received July 15, 1912," and the boy signed up there instead of down here because there wasn't room, thirteen days before the injury.

Q. Now, after you got this lease, Mr. Betts, dated November 1st and recorded the 28th day of November, 1911, at 10:30 o'clock, who was in possession of that mine from the first day of November on?

A. I was.

Q. In what capacity?

A. As lessee.

Q. Were you operating it at the time you were appointed receiver?

A. Yes, sir.

Q. In what capacity were you operating it?

A. As lessee.

Q. You operated it until your lease expired, did you?

A. Yes, sir.

Q. As lessee?

A. Yes, sir.

COURT: What is the consideration for the lease, Mr. Smith?

MR. SMITH: My recollection is, it is a royalty. He is to pay so much of the proceeds. Therefore, he accounted right along and showed his expenses.

(Transcript of Record, p. 311):

“To pay to said lessor as royalty ninety per cent of the net mill returns of all ore extracted or to be extracted from said mines; and said lessor is to have the sole and exclusive control and right to say to whom and how the ores extracted from said mines, and the concentrates therefrom, shall be disposed of, and said lessee will be directed solely and exclusively how said ores and concentrates shall be sold and disposed of.”

Witness testified page 312:

Q. I direct your attention to a report of the receiver, parts of which have been read, that was filed in this Court August 30, 1912. After that date did you still operate the mine?

A. Yes, sir.

Q. In what capacity?

A. As lessee.

Witness testified further, page 315:

Q. Now, when you operated that mine, did you keep an account or keep a record of your expenditures for each month?

A. Yes, sir.

Q. I will ask you to look at these documents and see if they are the records that you kept, the extended records and reports?

A. They are.

Q. I notice on the top of each one there is stamped "Robert M. Betts, Lessee." When was that put on there, Mr. Betts?

A. Why, it was put on at the time the vouchers were made out. Some of them are put on with the typewriter. The bookkeeper sometimes put them on with the typewriter and sometimes stamped them.

MR. SMITH: To save time, I will just ask him the question, or if you wish to prove it by the document, I will show it to you.

Q. But do these documents, as lessee, show you the time of Johnnie Bisher? Does it show his working time?

A. Yes sir, they should.

Q. Will you find one that does, if you can?

MR. CALLAHAN: The first one.

Q. Colonel Callahan says the first one, Mr. Betts.

A. Yes.

Q. Have you the report there that shows it?

A. Yes, sir.

Q. Will you kindly read the item? Just read it out loud so the jury can hear it, please.

A. "John Bisher, assistant lineman, 9½ days at \$3.00 a day, \$28.50."

Q. That is on this single report, is it?

A. Yes, that is on this. Total \$28.50.

Q. Was that paid to him?

A. I am sure it was, yes, sir.

Q. This report is for the month of July, 1912?

COURT: Who signed that up when payment was made?

A. Mr. Buxton came up and got all the checks for the men working at the power plant, and he signed for them and took the checks down there.

COURT: Do you offer that in evidence, Mr. Smith?

MR. SMITH: Yes.

Its introduction was objected to by Mr. Richardson, counsel for complainant.

COURT: You offer that in connection with the Court records?

MR. SMITH: Yes, your Honor.

COURT: The objection will be overruled.

COURT: Isn't this one of the vouchers, or is it?

A. It is one of the vouchers.

MR. SMITH: This is a list of the expenditures that he made for a month. This is a compiled list from which he made the report, of course. This is the payroll itself.

MR. RICHARDSON: But it has never been an exhibit in this other case. His vouchers were never filed with the clerk of this Court in his receivership reports.

COURT: Haven't those been filed?

MR. SMITH: That is the reason I am offering it now, to get it in evidence.

COURT: I will overrule the objection. You may save an exception.

This document is Appellant's Exhibit "H."

### **POINTS AND AUTHORITIES.**

Complainant and Respondent are both residents, inhabitants and citizens of the State of Oregon. This fact is conceded. That being a fact, the District Court of the United States had no jurisdiction in this case. The fact that respondent was sued as a Receiver does not give the Court jurisdiction where diverse citizenship is not alleged and proven. No Federal question, no Federal law, neither statutory or constitution, nor treaty provision was raised or involved as shown from the allegations of the complaint in this action.

Chief Justice Fuller, in the case of *Gableman vs. Peoria, D. & E. R. Co.*, 179 N. Y., p. 339, said:

"That the mere order of a Federal Court, sitting in chancery, appointing a receiver, did not in itself form adequate ground of jurisdiction. We cannot accept the suggestion that the mere order of a Federal Court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the Circuit Court of appeals in proceedings taken by him. The validity of the order of the appointment of the receiver in this instance depended on the jurisdiction of the Court that

entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made."

In the foregoing case, the Court further said:

"We decided that the suit was ancillary to the original cases in which the receiver was appointed, and that the jurisdiction was dependent on the ground of jurisdiction in those cases, and we also held that the receiver's orders of appointment were not equivalent to the laws of the United States in the meaning of the Constitution."

A case not depending upon the citizenship of the parties, nor otherwise specially provided for, cannot be maintained in the Federal Court unless some Federal statute, the Constitution, laws or treaties of the United States are involved, and that must appear affirmatively by plaintiff's allegations and cannot afterwards be supplied unless so alleged.

Palmer vs. Scriven, 21 Fed. Rep., p. 354.

Rice vs. Houston, 80 U. S. 13 Wall. 66 (20:484).

Willis vs. Missouri Pac. R. Co., 61 Tex. 434.

St. Louis I. M. & S. R. Co. vs. McCormack, 71 Tex. 661.

Armory vs. Armory, 95 U. S. 186 (24:428).

Texas & Pac. R. Co. vs. Richards, 68 Tex. 375.

Gingham vs. Cabot, 3 U. S. 3 Dall. 382 (1:646).

Robertson vs. Cease, 97 U. S. 646 (24:1057).

Davies vs. Lathrop, 12 Fed. Rep. 353.

Ex parte Smith, 94 U. S. 455 (24:165).

Beach, Receivers, No. 658.

Grace vs. American Cent. Ins. Co., 109 U. S. 278 (27:932).

The liability alleged by Complainant against Respondent arose under and was asserted under the Act of the State of Oregon known as the "Employer's Liability Act," page XXXVI, Vol. 3, Lord's Oregon Laws.

Suppose this action had to have been commenced in the State Court. The Receiver, under the act of March 3, 1887, as corrected by the act of August 13, 1888 (24 Statute at Large, Chapter 373, p. 552; 25 Statute at Large, Chap. 866, p. 433), could not have removed the cause to the District Court of the United States as that Court would not have jurisdiction from the mere fact that the Respondent was a receiver appointed by said United States Court. If such removal were made, a motion to remand same back to the State Court would be granted by the Federal Court as no Federal statute, constitutional nor treaty provision were involved.

Walker vs. Collins, 167 U. S. 57, 42 L. Ed. 76, 17 Sup. Ct. Rep. 738.

Blackburn vs. Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276, 20 Sup. Ct. Rep. 222.

Oregon Short Line & U. N. R. Co. vs. Conlin, 162 U. S. 498, 40 L. Ed. 1051, 16 Sup. Ct. Rep. 871.

Chicago R. I. & . R. Co. vs. Martin, 178 U. S. 245, 44 L. Ed. 1055, 20 Sup. Ct. Rep. 854.

Postal Teleg. Cable Co. vs. United States, 155 U. S. 482.

Western Union Teleg. Co. vs. Ann Arbor R. Co., 178 U. S. 239, 44 L. Ed. 1052, 20 Sup. Ct. Rep. 867.

Oregon Short Line & U. N. R. Co. vs. Skottowe, 162 U. S. 490, 40 L. Ed. 1048, 16 Sup. Ct. Rep. 869.

Sub. nom. Postal Teleg. Cable Co. vs. Alabama, 39 L. Ed. 231, 15 Sup. Ct. Rep. 192.

Chappel vs. Waterworth, 155 U. S. 102, 39 L. Ed. 85, 15 Sup. Ct. Rep. 34.

In the case of Graves vs. Corbin in the Supreme Court of the United States, page 471 Vol. 132 U. S., the Court said:

“This Court has held that when it appears to this Court that the case is one of which, under that provision, the Circuit Court should not have taken jurisdiction, it is the duty of this Court to reverse any judgment given below and remand the cause, with costs against the party who wrongfully invoked the jurisdiction of the Circuit Court.

Williams vs. Nottingway Twp., 104 U. S. 209.

“This rule has been recognized by this Court to the extent even of taking notice of the want of jurisdiction in the Circuit Court, although the point has not been formally raised in that Court, or in this Court.”

Turner vs. Farmers Loan & Trust Co., 106 U. S. 552, 555.

Mansfield, C. & L. M. R. Co. vs. Swan, 111 U. S. p. 379, 386.

Farmington vs. Pillsbury, 114 U. S., 138, 144.

King Bridge Co. vs. Otoe County, 120 U. S.  
225.

In the case of Frederick Bozman, receiver of the Rainier Power & Railway Company, vs. Samuel Dickson, 173 U. S. p. 113-115, Chief Fuller said:

“We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that because of his appointment as receiver, the judgment against him amounts to a denial of the authority exercised under the United States, or of the right of immunity set up or claimed under a statute of the United States. It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question and there was no suggestion in the pleadings, or during the trial, or so far as appears in the State Supreme Court, that any right the receiver possessed, as receiver, was contested, although on the merits the employment of plaintiff was denied and the defendant contended that plaintiff assumed the risk that results in the injury and had also been guilty of contributory negligence.”

In this connection the Court further said that:

“The mere order of the Circuit Court appointing a receiver would not create a Federal question under Section 709 of the Revised Statutes, and the Receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the State Court. The liability( of the receiver) to Dickson depended upon principles of general law

applicable to the facts and not in any way upon the terms of the order."

Witness Betts testified, page 318:

Q. But the signature on this Exhibit "A" is Johnnie Bisher's own signature?

A. He admitted it.

Q. The one dated July—

A. Fifteenth.

Q. Fifteenth, whatever it is?

A. Yes, sir.

John L. Bisher (complainant) gave the following testimony (Transcript of Record, page 78, et seq.):

Q. Who hired you? Do you know for whom you were working at that time?

A. Mr. Betts hired me.

Q. Well, do you know? It was he himself, was it?

A. I called up over the telephone.

Q. Now, something was said here this morning about Mr. Betts running that mine as lessee. You knew that he was running it away along in November, didn't you, before November?

A. I knew he was manager there.

Q. You have been up at the tunnel at the mine, haven't you?

A. The tunnel?

Q. Yes.

A. Yes, sir.

Q. You have been at the mill?

A. Yes, sir.

Q. You have been at the office?

A. Yes, sir.

Q. Did you ever see those notices that were posted there stating who was running that mine, that Mr. Betts was as lessee?

A. I never noticed it, never stopped to notice. When I went in the office, I just went after my check.

Q. You, of course, could write before you were hurt?

A. Yes, sir.

Q. You wrote right-handed, too, didn't you?

A. Yes, sir.

Q. Would you know your signature, if you should see it?

A. I am pretty sure I would?

Q. I will ask you if your name was signed to that paper by yourself?

A. Yes, sir.

Q. And did you notice at the time that that was Mr. Betts lessee?

A. I never noticed.

Q. His name being there?

A. I never noticed that.

Q. This is a receipt for a voucher, isn't it? Or it is your voucher for work, dated July 15, 1912, about a week before you were hurt?

A. I don't know why I signed that.

Q. Well, it is a receipt, isn't it, acknowledging that you have been paid for your work?

A. I don't remember ever signing that, but I know the signature.

Q. Yes, that is your signature, isn't it?

A. Yes. I don't remember ever seeing those little slips like that on the one I signed.

Q. And Mr. Betts' name is Robert M. Betts, just like that there, isn't it?

A. I never seen that "Robert M. Betts, Lessee," before like that.

Q. You didn't notice that at the time? Is that it?

A. I never did notice it.

Q. His name is Robert M. Betts, isn't it?

A. I have seen that Robert M. Betts.

MR. SMITH: We will ask to have this document identified. Then I will show it to Mr. Richardson marked "Defendant's Exhibit A."

In the examination of Robert M. Betts, a witness for Respondent, his report as Receiver was introduced in evidence. (Transcript of Record, p. 313 to 315 inclusive). Plaintiff in error would call the Court's attention to Section 3 of said report:

"3. That during the said receivership of said Cornucopia Mines Company of Oregon as aforesaid he held and operated said Mines under a written lease with said Cornucopia Mines Co. from the first day of November, 1911, until the first day of November, 1912.

“4. That hereby submits this his final report of the operation of said mines under said lease and receivership to this Court.

“6. That all the property of every kind and character, real and personal, and all assets of Cornucopia Mines Company of Oregon, Respondent, were sold under a decree and order of this Court on the 29th day of June, 1912, by Ed Rand, the Special Master of the district Court of the United States for the District of Oregon, who was theretofore appointed by this Court as such special master, and before said sale as aforesaid he duly qualified as such special master; that at such master's sale as aforesaid, said property, real and personal, was sold to C. E. S. Wood, as trustee, by said Ed Rand, as Special Master of this Court, and said sale was afterwards by this Court duly confirmed.

“7. That there is no other property, real or personal, of said Cornucopia Mines Company of Oregon, Respondent, unsold or remaining to be administered upon by said Receiver.”

The testimony shows, and it is not contradicted, that Robert M. Betts personally was operating the mine and electric power plant and the electric wires over which the current was conducted, under a valid recorded lease to the whole thereof, which lease ran from the 1st day of November, 1911, to October 31, 1912. Said lease was signed and executed on the 9th day of November, 1911, by the lessor and lessee thereto.

Section 744, in relation to liens on mines, Lord's Oregon Laws, Vol, 3, p. 2662, provides, among other things:

“AND PROVIDED FURTHER, that this section shall not be deemed to apply to the owner or owners of any mine, lode, mining claim, deposit, shaft, tunnel, incline, adit, drift, or other excavation, road, tramway, trail, flume, ditch or pipe line, building, structure or superstructure, when the same shall be worked by a lessee or lessees, or by any person or persons other than the owner; PROVIDED, the lessor or lessors, or other person or persons other than the owner of any such mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavation, mill site, or mill, shall have recorded in the mining records of the County wherein any such mining property is located, a copy of such lease, or any other instrument, before the work shall have begun on such property, except as hereinafter stated; provided, further, that the owner or owners of any such mine or mines, lodes, deposits, shaft, tunnel, incline, adit, drift or other excavation, mill or millsite, shall, in the manner hereinafter prescribed, post, or cause to be posted, at not less than three conspicuous places upon such mine, at or near the place thereon where the same is being worked or developed, a notice in writing, signed by the owner or owners of such property, stating the name or names of the lessees, or other person or persons other than the owner operating said property, and that the owner or owners thereof will not be responsible for any debt or debts contracted by the lessee or lessees, or other person or persons other than the owner, in connection with the working, operation or development of such property, or for any work, improvement or development thereon under such lease or other instrument.”

When Bisher (complainant) was being cross-examined, his attention was called to the fact, and he was asked if he did not see notices that the mine was being operated by Robert M. Betts, as Lessee, posted at the mill, tunnel and office of said mine. He evaded a direct answer by saying that he had been at all of those places but that he went to the office to get his pay.

It is not necessary as a matter of law, or under the foregoing statute, that Respondent should prove that the employees of the lessee operating the property, had seen the notices that the property was being operated under a lease; the presumption is, or it is incumbent upon the employees to have notice thereof if said notices were posted as required by law. Under the express provisions of the foregoing section (No. 7444), no lien can be held or enforced against mining property for labor performed, or injuries caused while the mine is being operated under a lease where the lease was recorded before the work was begun.

Lewis vs. Beeman, 46 Ore. p. 311; 80 Pac. 6. 417.

We take it that it cannot, in the light of the testimony, be seriously contended but what Robert M. Betts was working and operating the electric power plant and mines of the Cornucopia Mines Company of Oregon from the first day of November, 1911, to the 31st day of October, 1912, as lessee; you will note the injury complained of and alleged by complainant in his complaint occurred on the 28th day of July,

1912, during and at the time that Robert M. Betts was operating said electric power plant and mines as lessee. Further the testimony shows that Bisher, the complainant, received and receipted for his pay during all the time he was in the employ at the Cornucopia Mines of Oregon from Robert M. Betts as lessee, and not from any other person, corporation or source. See Defendant's Exhibits "A," "G" and "H."

There is no contention on the part of the complainant but what the mines and power plant were sold under a mortgage foreclosure under a decree and order of the United States District Court for Oregon on the 29th day of June, 1912, just thirty days before the date (July 28, 1912) of the alleged injury to complainant, by Ed. Rand, the Special Master of the District Court of the United States for the District of Oregon, who was theretofore appointed by that Court as such Special Master, and before the sale as aforesaid he duly qualified as such Special Master; that at such Master's sale as aforesaid, said property, real and personal, was sold to C. E. S. Wood, as Trustee, by said Ed Rand, as Special Master of said Court, and that such sale by said Special Master was afterwards by said Court duly confirmed.

By the statute of the State of Oregon, Section 252, Lord's Oregon Laws, Vol. 1, p. 269, it is provided who is entitled to possession at an execution or foreclosure sale of real property. Said Section is as follows:

"The purchaser from the day of sale, until a re-

sale, or a redemption, and a redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same shall be in the possession of a tenant holding under an unexpired lease, and in such case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period." And operated mines, power plant and appurtenances for the full term of his lease.

It is therefore plain that this case should have been dismissed, as Betts was sued as receiver and not as lessor (Record, page 40).

This section has been interpreted and passed upon by the Supreme Court of Oregon in:

Cartwright vs. Savage, 5th Ore. 397.

Bank of British Columbia vs. Harlow, 9th Ore. 388.

U. S. Mortgage Co. vs. Willis, 41 Ore. 484, 69 Pac. 266.

Eldridge vs. Hofer, 45 Ore. 243, 77 Pac. 874.

Gest vs. Packwood, 39 Fed. 532.

Balfour vs. Rodgers, 64 Fed. 927.

On and after the 29th day of June, 1912, when said mines and electric power plant were sold under the decree of foreclosure and order of said Court, the purchaser immediately on the day of sale took possession of said property under the foregoing statute, and by operation of law, and as a matter of law the property could not have been operated or controlled by Robert M. Betts, as receiver. His receivership

therefore could not be more than a mere empty shell, after the sale and purchase of the property by Wood as Trustee, there was no longer any property left for the Receiver to hold, work or operate.

At the time of the sale under the foreclosure of the mortgage of the Cornucopia Mines Company's of Oregon property, whatever interest or claim Betts had was on that date (June 29, 1912), extinguished, and the purchaser at the sale succeeded thereto instantler.

You will note that this sale was had on June 29th, 1912; the injury is alleged to have happened on July 28th, 1912. (See T. R., page 313.)

At the date of injury it was impossible for Betts, as receiver, to be operating the mines and electric power plant.

But he was operating it as lessee, because:

(A) His lease became effective on November 9th, 1911.

(B) Its term was one year duration.

(C) Betts as lessee was not a party to the foreclosure proceeding.

(D) He took and held possession under the lease.

### **INSUFFICIENCY OF EVIDENCE.**

At the close of plaintiff's case, the defendant moved for a non-suit upon the grounds that the evidence was insufficient. (B. E., page 26; Trans. Test., page 91.) The motion was overruled and an exception taken.

AUTHORITIES CITED IN ARGUMENT BY  
PLAINTIFF IN ERROR:

POINT I.

Physical facts showing injury--  
Verdict unsustained.

Peat v. C.M. & St.P. 107 N.W. 355.

POINT II.

Witnesses who "Don't remember"  
"Didn't recollect", etc.

Idaho Mercantile Co. v. Kalangram  
8 Idaho 101 (109); 66 Pac. 933.



And thereafter, and at the close of the testimony and before argument, the defendant further moved for a directed verdict upon the grounds specified in said motion. (B. E., 26-28; Trans. Test., 336-338.)

Having described the first two grounds of said motion, we now come to the third, which is as follows (B. E., page 27):

“That the evidence fails to disclose a proximate cause for the injury other than the negligence of plaintiff himself, and that there was no negligence of the master which was shown to have contributed in any way to the injury.”

### **STATEMENT OF FACTS.**

At the time Bisher was injured he was working on the pole in the presence of himself and Harry Harbert, the lineman.

In telling how he was hurt, Bisher says as follows (Trans. Test., page 48):

Q. What did he tell you to do before?

A. He told me to wrap one end while he wrapped the other. He says, “We can do it quicker.”

Q. What did you to do when you got up on top of the pole?

A. Well, he had already had one end of the middle wire, tie wire, unwrapped, and I unwrapped my end and took the middle wire in my right hand and started to lift it over the pole as we had been doing before.

Q. Why did you lift the wire over the pole, or

did anyone tell you to do that, Johnnie?

A. Harry told me to do that.

Q. What did he tell you to do that for?

A. Well, to keep it farther away, so it wouldn't be apt to touch the other wire.

Q. Now, what happened when you were lifting this wire?

A. I just started to lift the wire up with my right hand. I was standing just—the wires came nearly to my shoulders—just about that high. I had to get up high enough because they were pretty heavy. I just started to lift up the middle wire, and that is the last I remember.

At pages 55-56 the witness describes his position on the pole.

At page 61 witness says, on cross-examination:

Q. Do you know what part of the wire you touched with your left arm, or what part of your left arm touched the wire?

A. I don't remember anything about it. The last thing I remember was when I started to lift up the wire with my right hand.

Q. You don't know how you were hurt?

A. I don't know how this came in contact, this hand, at all.

Q. You do know that you had to touch two wires to get a shock, don't you?

A. That is what Mr. Buxton told me.

Q. They always told you not to touch two wires?

A. Yes, Mr. Buxton told me.

Q. You didn't have any duties that required you to touch two wires, did you, at the same time?

A. No, sir.

\* \* \*

Q. You knew those wires were live, didn't you?

A. Yes, sir. He told me they were 2300 volts.

At pages 65-66 the witness says:

Q. And neither you nor Mr. Harbert had met with any mishap because of these wires before, had you?

A. No, sir.

Q. Now, you knew when you were working there that these were high-tension wires?

A. Yes, sir.

Q. And carrying a high voltage?

A. Yes, sir.

Q. You were cautioned not to touch two of them at the same time?

A. Yes, sir.

At page 69:

Q. How long had you known that those wires carried that voltage? Did you know it every day you worked there?

A. Oh, I had known it ever since I had been in the country—I heard that.

Q. Of course, you had known that electricity was very dangerous, haven't you?

A. Yes, sir.

And at pages 74-75:

Q. Now, do you know whether, as quick as you

got into trouble, Harbert struck your hand and knocked it off the wire?

A. I don't know anything about it.

Q. You don't know what happened at all after you got shocked?

A. I don't remember anything after I started to lift up the middle wire.

Q. And you cannot tell the jury now how you happened to lift up these two wires?

A. No, sir, I can't do it.

Q. No duty you had required you to touch two live wires at the same time?

A. No, sir.

And on page 76 the witness says, in describing his position on the pole:

Q. Where was your left hand?

A. I don't know. Sometimes they were heavy, and if we just had to lift them straight up, I would lift them with both hands.

And at page 77:

Q. And you don't know whether that was the situation or not?

A. I don't think he had hold of the wire at all, but I don't remember for sure.

And at page 89:

Q. Concerning these pliers, you were not using pliers when you were hurt, were you?

A. I did just a little before.

Q. At the time you were hurt you were not working with pliers, were you?

A. No, sir. I just started to lift up the wire.

Q. And the pliers that were used there by Harbert didn't have any insulated handles, or anything of that kind, did they?

A. No, sir.

Q. So you were not hurt by reason of the pliers?

A. No, sir.

Q. And at one time also you spoke of a pad, or a protection, I believed you called it a belly pad that men sometimes used?

A. I didn't say anything about a belly pad.

Q. Well, it was brought out in the opening statement. Do you know where they use those pads, and under what circumstances?

A. No, never heard of a belly pad.

\* \* \*

Q. And you were not hurt by reason of not having a pad in front of your body? It was your arms that came in contact with the wire?

A. Yes, sir.

Witness Harbert thus describes the injury (Record, page 154):

Q. What work could Johnnie Bisher do in the position that he says he was in?

A. Well, at the time of the accident, he couldn't have done a thing..

Q. Was he doing any work at the time of the accident?

A. No, at the time of the accident he was standing on the pole, he was leaning with his left arm

hold of this wire, just as a rest, leaning back. He was standing in this position. And when I seen him, that hand was thrown up and hit right across the wrist. It might have been up further, too. But the whole hand just was stuck there. Of course, when it hit the other wire, it stuck.

Q. What did you do?

A. I loosened my safety and pulled out my hooks, so they would be loose, and reached over and knocked that arm off.

And at page 160:

Q. When this young man got hurt, he was not hurt by any static condition there?

A. No, sir, he had hold of both wires, or else he hit one hand against the other wire.

Q. Came in contact with them, did he?

A. Yes, sir.

Q. Do you know of any conceivable duty, is there any possible duty, that a lineman has to discharge that would require him to catch two of those live wires at the same time?

A. No, sir.

And at page 164:

Q. You were putting this porcelain insulator in where the glass was, one like that?

A. Yes, I just started to put that on.

And on page 168 the witness says:

Q. Well, whatever it is, the jury saw. Now, you claim that he had his hand, he had hold of the wire with his left hand?

A. With the left hand, yes, sir, was the hand he was resting on the wire on this side.

Q. Now, I wish you would please tell the jury whether, if you have a tight hold on a wire, and voltage goes through it, we will say 2300, and with the other hand you touch another one, which hand is it that is going to get the burn?

A. Why, the one that you touch, because if you have a tight wire you will get more of a shock but less burn. Wherever it arcs, wherever the wire is right close to the hand, but not quite touching, it will arc across; after it touches once, it draws an arc.

Q. What do you mean by an arc?

A. That is the fire.

Q. Just like a stroke of lightning?

A. That is the burn. The arc, that is the fire.

Page 196, on cross-examination:

Q. Now, you stated, I believe, on your direct examination, at the time this accident happened, Johnnie had his left hand on the wire?

A. He had hold with the left hand.

Q. He had what?

A. He had hold of the wire with his left hand.

Q. Which wire?

A. This wire right here. This insulator was on the side of the cross arm. That insulator was on that. Two insulators tied in. That insulator there was tied in. This wire was laying over here. As I say, I just started to screw that insulator on. John-

nie was leaning back here on his spurs and was holding onto this wire.

Q. What was he holding onto that wire for?

A. Why, for a rest, I should suppose. That is what I usually do. I couldn't say that.

Q. Do you usually hold on there to rest? You get tired, you grab hold of the wire to hold yourself up?

A. I cannot say I do. But I often put my arm over anything like that. I have done that. And when he had hold of this wire he must have flung his hand up. I didn't see him throw it up, but I must have seen it the second he got it up. That hand was laying, or looked like to me, the wire was right across there like that—he just hit the wire.

At page 197:

Q. Now, did you say anything to him while he had his arm or hand, left hand, up on that wire?

A. It happened so quick, it was all over in a second.

At page 198:

Q. How was he holding that wire with his left hand?

A. This way.

Q. Just had hold of it with his hand?

A. Just had hold of it with his hand.

Q. Just gripped with his hand, left hand?

A. Yes, left hand.

Q. That is the part of his hand he has left now? You know his right hand is off entirely?

A. Yes.

Q. And he had hold of that?

A. Yes, sir.

Q. And he was in that position when the accident happened?

A. He was.

These two are the only witnesses to the accident and the only persons who know the facts of the case, and each one asserts that he knows nothing as to how it happened. Question: Where, then, is proof of the negligence of the master?

The negligence of the master is left to inference and conjecture. There is no proof on the subject. It is as easy to infer that the injury was caused by the negligence of Johnnie Bisher as by the negligence of the master, and the proof is just as strong.

In addition to the above testimony, this record conclusively shows that no electrician, or lineman, or person, connected with the plant has any duties to perform which require him to touch two wires at the same time.

Witness Bisher's testimony, *supra*.

Witness Harbert's testimony, *supra*.

L. W. Sloper (plaintiff's expert) testifies (pages 118-119):

Q. Now, can you conceive, or do you know of any duty that a lineman has to perform anywhere that requires him to touch two of these live wires at the same time?

A. That is something we try to keep from doing.

Q. Well, now, will you kindly answer that question? Is there any possible duty that he could be performing that would require him to touch two wires at the same time?

A. Not that I ever heard of, no.

Q. If he would, his work would be pure carelessness, wouldn't it?

A. Well, we all make mistakes, you know.

Q. Kindly answer the question. Wouldn't it, in your judgment?

A. Well, I don't consider it that way, no. I know too many get it to do it.

Witness Myers (defendant's expert), page 210:

Q. You have seen men who have been shocked by electricity, and know where the shock comes, don't you?

A. I have seen a couple of them.

Q. Suppose a man has a tight grasp of one wire charged with 2300 volts, and should hit the other one, which hand would show the burn?

A. The one that made the least contact.

Q. The one that had tight hold would not show much of a burn?

A. No, it would not show much of a burn in proportion.

Q. You say the one that drew the arc would show the burn?

A. That is where the heat is.

Q. That drawing an arc is just the electricity shooting across the air?

A. Shooting across and pulling the arc across.

Witness Frank A. Hull (defendant's electrician), pages 230-231:

Q. You have seen in your experience the effect of electric burns, haven't you?

A. Yes, two or three.

Q. Suppose that a man were working on this pole—you see the picture of it—the regular lineman over here, and the young fellow on this side, suppose the young fellow was standing down the pole so that his chin was just about even there, can you think of any duty he could perform, or aid in performing with the other fellow changing those insulators?

A. Why, I don't know as he would be of any material help to a man there at all.

Q. Suppose that he were in that position, and had his hand up ahold of this wire, and that through some way he must have come in contact with another wire, which hand would show the heavier burn if he had hold of the wire, 2300 volts, with his left hand, and happened to hit another one with his right hand or arm?

A. The burn would show up where the arc would be, he more than likely would get a shock, and the contact would be where the arc would, of course, be where it was loose, where the contact was being broken.

Q. The hand that was closed over the wire, then, wouldn't show the burn?

A. Naturally it wouldn't be burned so bad.

Q. And the one that would be burned?

A. Would be where the arc hit it.

Q. You mean the arc, the lightning flash or stroke of jumping electricity?

A. Yes. Oftentimes happens when you let go—if you let go there, the arc would follow.

Witness C. A. Buxton (defendant's general electrician), page 275, says:

Q. Is there any possible duty that you can think of, or ever heard of, that Johnnie would be discharging if he got against both of the wires at the same time—was there any duty that required him to do it?

A. No, sir. If he did, it would be done thoughtlessly, not in the discharge of his duties.

The above evidence is from the following witnesses:

Johnnie Bisher, plaintiff.

L. W. Sloper, plaintiff's expert.

Harbert, defendant's lineman.

Myers, defendant's expert.

Hull, defendant's expert.

Buxton, defendant's general electrician.

They all agree upon the following points:

A. It takes a double contact to get a shock.

B. No conceivable duties require a man to touch two live wires at the same time.

C. Johnnie Bisher necessarily received a double contact; that is, he touched two live wires at the same time.

Argument is unnecessary. He was not in the discharge of his duties when he received the shock, and it was clearly the result of his own carelessness.

Therefore, we see that the evidence not only fails to disclose a proximate cause for which the defendant is liable, but it conclusively shows the injury to be due to the negligence of the plaintiff.

## **POINTS AND AUTHORITIES.**

Under this branch of the case, we submit the following Points and Authorities:

### **POINT I.**

The plaintiff must show the proximate cause of his injury to be a neglect of some duty of the master. Failing in this, his case falls.

Patton vs. T. & P. R. Co., 179 U. S. 653, Book 45 L. Ed. 361.

Stratton vs. Nichols Lumber Co., 39 Wash. 323 (109 Am. Sta. 881).

### **POINT II.**

Evidence which is as compatible with the negligence of the plaintiff as the proximate cause of his injury, as it is with the negligence of the defendant, proves nothing. The burden of proof is on the plaintiff.

Grant vs. Ry. Co., 133 N. Y. 657 (33 N. E. 220).

Tyndal vs. Old C. R. Co., 156 Mass. 503 (31 N. E. 655).

**POINT III.**

Where the evidence shows the injury to have been caused by the negligence of the plaintiff, he cannot recover.

Patton vs. Ry. Co. (Supra).

Stratton vs. Nichols Lumb Co. (Supra).

**POINT IV.**

The Employers' Liability Act of Oregon, Laws of Oregon, 1911, page 16, does not limit or restrict the defense that the injury was caused by plaintiff's own negligence. There is a vast difference between "own negligence" and "plaintiff's contributory negligence."

**INSUFFICIENCY OF EVIDENCE (Continued)****Volunteer.**

The evidence, we think, conclusively shows that Johnnie Bisher was a volunteer; that he had no duties whatsoever on the pole, and especially none that required him to touch two wires.

Upon this point the record shows:

Witness John L. Bisher, Jr., plaintiff (page 43):

Q. And what did you do when you went to the mine?

A. Well, the first night I worked on the rock crusher.

Witness says he was directed to work there by Mr. Bishop, the superintendent of the mill; thereafter he worked by the compressor room; thereafter

he wheeled out dirt (page 44); thereafter shoveled rock into the crusher; thereafter helped tear out floors and take out old machinery; thereafter worked on the dump; thereafter (page 45) dug trenches for concrete foundation. Ed Mills was foreman. Mills told Bisher that Buxton wanted him on the line.

Q. (Page 45) What did Buxton tell you when you got down there?

A. I went down to the town. I met Harry Harbert down there and he told me to come over to the store and he would get some tools there, and I asked him what he was going to do, and he said he would wire a few houses before we worked on the line. And we wired a saloon, and then went over—he put in a light at the hall; **I JUST HANDED HIM TOOLS.** And then we went, the next job, we went up to Mr. Bett's house and put some wires in his house. Then one day we went down to the power house, and Mr. Buxton told us what kind of a tie to put on the pole.

And we here, and now, respectfully ask the Court's attention to the last statement of this witness just made, wherein he says:

**“MR. BUXTON TOLD US** what kind of a tie to put on the pole.”

Q. Did he show you how to tie it?

A. He showed how to tie it. He made an insulator there, and he also had a wire, and a tie wire, and he cut and wrapped that around the insulator, and showed—Harry Harbert just before that had figured out a tie, and Mr. Buxton, when we got down there,

said that wouldn't do—**AND HE SHOWED US ANOTHER ONE**, and he said that that was the one he wanted to use. And we told him all right. And he told me to help Harry Harbert.

Q. He told you to help Harry Harbert? (Page 46).

A. Yes, sir.

Q. Then what did you do?

A. Well, we went up the road a little ways, and Harry fixed poles.

Q. What did Mr. Buxton tell you to help Harry Harbert to do?

A. He didn't say just what to do. He just said, help Harry. He said Harry would tell me what to do.

Q. He said Harry would tell you what to do?

A. Yes, that was down at the power house.

Q. Well, what did Harry tell you to do?

A. Well, Harry climbed the pole, and I just carried some of the tools along first, and he went up the pole and fixed three or four himself. Then he told me, he says, "Well it is pretty hard standing up there so long." He said, "We will take turns about." He said, "You come up and fix one, and I will fix the next one." I said, "All right," because Buxton told me to do what he would tell me; that he would tell me what to do. He went up there, and told me to fix the other one. He said it would be easier on both of us. We did that for a few times. He worked a day or two that way, and then he saw that was pretty hard standing up there so long for one man, and he said,, "We will both come up at the same time." He

says, "One can wrap one end of the tie wire while the other wraps the other." He said, "We can do it quicker," and he says, "We can watch each other at the same time," and he says, "Maybe we won't get no shock if we watch each other. Maybe it will make it safer." And that is the way we were doing when I was injured.

Q. Now, this last pole, who climbed this last pole first that way—climbed the pole on which you were injured?

A. Harry.

Q. What did Harry tell you to do?

A. He just told me to put some insulators in the sack, and tie it to the rope, and he would draw it up. Then he told me to come up and do as I had done before.

Q. Well, what did he tell you to do when you got up on top of the pole? Did you get on top of the pole?

A. Yes, sir. I just got so my head was up, oh, just up about between the wires, about like that (illustrating.)

Q. And where was Harry Harbert at this time?

A. He was on the opposite side of the pole.

Q. He was on the opposite side of the pole?

A. Yes, sir.

Q. About the same distance up the pole?

A. About the same distance.

Q. (Page 48). What did Harry tell you to do?

A. Well, he just said to fix—he didn't say just what to do then, because he told me what to do before.

Q. What did he tell you to do before?

A. He told me to wrap one end while he wrapped the other. He says, "We can do it quicker."

Q. What did you do when you got up on top of the pole?

A. Well, he already had one end of the middle wire, tie wire, unwrapped, and I unwrapped my end, and took the middle wire in my right hand and started to lift it over the pole, as we had been doing before," etc.

It is thus plain, from Bisher's own testimony, that on the particular arm in question he did not wire in a single insulator. The insulator at either end had been wired in before he got up on the pole. He was not, therefore, doing the work, as he claims in his testimony, as he had done before.

Although Witness Bisher, at Page 48, says:

Q. What did Harry tell you to do?

A. Well, he just said to fix—he didn't say just what to do then, because he told me what to do before.

Yet, at Page 48, he says:

Q. Why did you lift the wire over the pole, or did anyone tell you to do that, Johnnie?

A. Harry told me to do that.

Concerning this same thing, Harry Harbert says (Pages 155-156):

Q. Did you request him to come up there to help you at that time?

A. No, sir.

Q. Did you at any time request him to work on these poles on that work with you?

A. No, sir.

Q. What was he there for?

A. Well, he was there to help me carry insulators, send the insulators up to me.

Q. How did you handle getting insulators from him up to you?

A. (Page 156). I had a rope tied on my belt to a concentrate sack, similar to a gunny sack, tied on the end, to pull them up.

Q. He would be down on the ground, would he?

A. Yes, sir.

Q. A position of perfect safety?

A. Yes, sir.

At pages 161-162:

Q. Now, I believe you stated yesterday that you had put on the new insulator on both the outside pegs?

A. I did.

Q. The wires were tied in?

A. Tied in, yes, sir.

\* \* \*

Q. Now, did you do the work of completing that line, putting the insulators on?

A. I did.

Q. Did you ever have any helper there on the line?

A. No, sir.

Q. A man hired to help you?

A. No, sir.

Q. You completed it alone, did you?

A. Yes, sir.

Q. Now, do you know what Johnnie was doing while he was up there on that pole?

A. Well, **he was up there to see what I was doing.** He wanted to learn the business, and I was showing him everything I could.

Q. Did you hear him testify yesterday that you had told him to come up and help you, or words to that effect?

A. Yes, I did. I heard him testify.

Q. Well, had you ever done so?

A. No.

\* \* \*

Q. (Page 163). You heard him state yesterday, did you, about his position on the pole, about his chin being just above the cross arm so he could see?

A. Yes, sir.

Q. Is there any work he could do in that position?

A. Well, not in that position, no. He would have to be a little higher to do any work to speak of.

(Page 173):

Q. What do you call a boy that runs along the ground and carries those supplies?

A. Usually call him a grunt, or helper, things like that.

Q. Did his duties as helper out there require him to get into any dangerous place at all?

A. No.

Page 187 (cross-examination):

Q. Well, what was he out there for?

A. At work.

Q. Along the line? You said he was along the line, wasn't he?

A. Well, he was to carry insulators, cut tie wires, do things like that; send them up to me when I wanted them. That was my understanding.

Q. You knew he was to help you, didn't you?

A. How is that?

Q. You knew he was instructed to help you, didn't you?

A. Yes.

Pages 188-189:

A. When he started to climb the pole? I don't think I said a word to him when he started to climb. I was up there working.

Q. Did you say anything to him when he got to the top?

A. I think it was on that very pole—I wouldn't swear to it—that I cautioned him about the wires.

Q. Now, he had been up other poles. He had been climbing other poles before this, hadn't he?

A. I think he was on—

Q. What about the pole before?

A. I should say he was on three poles before that with me.

Q. On three poles? What did he do on those poles?

A. Well, he brought up insulators, and on one pole

he tied the wire on one wire. I showed him how and let him do that.

Q. Now, didn't you say yesterday that you took the insulators all up by a rope?

A. Did I say all of them?

Q. Yes.

A. I don't know whether I said that or not. I think I said that was what I understood his duties to be; that he sent the wires up to me. But I didn't say that he wasn't on a pole, because he was.

Q. Then was there any necessity for him to be on the pole if you had a rope to take up the insulators?

A. No, not necessarily. No necessity.

Q. And what did you say to him when he got up on the pole?

A. I cautioned him about being on this pole, told him he didn't have to come up there. I didn't have any authority to fire him down, or anything like that.

Q. You didn't?

A. No, sir.

Q. You didn't want to hurt his feelings, did you?

A. Well, Johnnie—I liked Johnnie, and would show him everything I could.

Q. Did you show him how to make a tie?

A. I think he watched me, yes.

Q. He didn't make the tie himself?

A. No.

\* \* \*

Q. You don't remember?

A. No, not whether he lifted a wire or not. I know in this particular case he didn't.

Q. But you cannot testify as to what he did on the other poles before you reached this last pole, on which the accident happened?

A. Well, he watched me there, and on one pole, as I told you, he tied over on one side there on one of the wires.

Q. Now, did you tell him that he was not expected to climb any poles?

A. Yes, sir.

Q. You told him that, didn't you?

A. I told him there was no use in it; he was not paid for that.

Q. Well then, tell me, Mr. Harbert, why he had pliers and a belt and climbers with him. Explain to the jury why he happened to have these with him all the time.

A. **WELL, HERE IS WHY HE HAD THOSE— ANYTHING THAT COULD HAPPEN TO ME, OR ANYTHING THAT HE MIGHT BE ABLE TO HELP ME OFF, OR SOMETHING LIKE THAT. NOT THAT I WAS AFRAID OF ANYTHING, BUT IT WAS JUST THE IDEA OF HAVING A MAN ALONG THAT KNEW HOW.**

Witness C. A. Buxton (Defendant's General Electrician) Page 268:

Q. Did you know that day, or did you know that this boy was up on those poles?

A. No, sir, I didn't know that he ever was on the poles. So far as my knowing, I don't know that he got burned on the pole only from what—

Q. Just what they have told you?

A. Just wht they have told me.

Q. Of course you believe it?

A. Yes, sir, there is no doubt about it.

Q. You didn't know he was professing to go up these poles?

A. No, sir, I didn't know he had any intention of going up the poles.

Q. For these purposes?

A. For these purposes.

Q. Did you ever give him a pair of climbers?

A. I gave him the privilege of a pair of climbers and insisted he should take them.

Q. What for?

A. So in case Harry Harbert got hung up—our lineman—Johnnie would be there to render the same assistance that Harry did to Johnnie.

Q. You knew that he could climb poles, did you, when you hired him?

A. That is why I hired him; because when Johnnie asked me for the job, it was down town, and Johnnie was working for Mr. Betts at the time on the hill, and when Johnnie spoke to me, I says, "Yes, Johnnie, I thought of you, you being able to climb, why, there, will be a chance for you," and I says "Have you got a pair of hooks?" He says, "Yes." "Well," I says, "I have got a pair down there that you can use, but the probabilities are you would rather use your own rather than use strange hooks, and I would like for you to have a pair along with

you, so that if anything happens to Harry, you will be able to get up and down the stick, and you had better have your own hooks," meaning that if anything happened to Harry—Harry Harbert, our line-man—if he should get burned or hung up, as we call it, why Johnnie would be there, would have hooks, so that he could get up to help him.

Q. Did you know that Johnnie had ever tried to tie any wires on those insulators?

A. No, sir.

Q. You didn't know it at the time, did you?

A. No, sir.

Q. Didn't hire him for that purpose?

A. No, sir.

Q. What did you hire him for?

A. I hired him to do ground work as a helper, and it was understood that that was what he was for.

Referring to the testimony of John L. Bisher, Jr., that Mr. Buxton had instructed **US** (meaning himself and Harry Harbert) how to make the ties at the insulators, this witness says (Page 269 et seq.):

Q. Now, did you ever instruct him—you heard his testimony about your showing him how to make a tie?

A. Yes, sir.

Q. Did that ever happen, Mr. Buxton?

A. Why, I never did show Johnnie. I remember of showing Harry how to make the tie, and if Johnnie why if he was there and asked any questions, I would have no doubt but what I answered them.

Q. You were always glad to inform him if he wanted to know anything?

A. Always; because I never know anything so well as after I have told somebody else.

Q. So that if he did get any talk from you, it was just as a matter of information? Was that it?

A. Yes, sir.

Q. You were not instructing him about any duty then?

A. Not that he had to perform.

Witness Robert N. Betts (Receiver and Defendant), Page 319:

Q. Did anyone ever tell you, Mr. Betts, or did you know, that Johnnie Bisher was purporting to work up on a line like that?

A. No, I did not.

Q. You knew that he was a bright boy, and learning all he could, didn't you?

A. Yes, sir.

Supporting Harbert's claim that Bisher was on the pole watching him and trying to learn how to do the work, Witness Betts says (on cross-examination), Page 321:

Q. Did you ask him if he wanted any rubber gloves, or needed any?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Why didn't you?

A. Because I had no idea that he was going on the pole.

Q. No idea he was going on the pole?

A. No, sir.

Q. Why didn't you think he was going on the pole, Mr. Betts?

A. Because Mr. Buxton said to me, "I have a good man to change that pole line." I said, "Who is he?" He says, "It is a young man from the valley by the name of Harbert." I said, "That is good," and I thought that Mr. Harbert was going to fix that line.

Harry Harbert, defendant's lineman, claims that Johnnie Bisher was studying electricity and was trying to learn all he could, and therefore he climbed this pole and watched him. Concerning this particular point, Johnnie Bisher testifies as follows (Page 67):

Q. And you had seen Harbert work with these wires, right along, hadn't you?

A. Yes, sir.

Q. Were you studying electricity at that time?

A. Just had a little bit in school—physics.

Q. Naturally you wanted to find out all you could about it, didn't you?

A. I didn't want to find out there. I intended to go to an electrical school after.

Q. You have always wanted to be an electrician, haven't you?

A. Yes, sir.

Q. And of course, what you could find out, you wanted to learn as much as possible, didn't you?

A. I wanted to learn everything that I could.

This piece of testimony explains how it is that Johnnie Bisher says that Mr. Buxton, the General Electrician, showed **US** (Meaning himself and Harry Harbert) how to make the ties, when Buxton swears that he was simply showing Harbert, and if Bisher saw it, he was a volunteer.

Concerning this same thing, Harbert says (Page 162):

Q. Now, do you know what Johnnie was doing while he was up there on that pole?

A. Well, he was up there to see what I was doing. He wanted to learn the business, and I was showing him everything I could.

We submit the evidence on this point as clearly demonstrating, beyond any doubt, that Bisher was a volunteer on the pole, seeking information for himself, and not in the discharge of any duty.

The master had furnished him and also Harbert, whom he was assisting, with means of sending up the supplies to Harbert, which did not require Bisher to be on the pole in any way or at all.

Of course, if Bisher was a volunteer, he could not recover, under the following:

### **POINT V.**

A volunteer assumes all risks of the place and cannot recover against the master for injuries except where they are wilfully or wantonly inflicted.

## **INSUFFICIENCY OF EVIDENCE (Continued)**

### **Negligence Charged in the Complaint.**

It is our contention that the evidence does not sustain any charges of negligence set forth in the complaint. These are as follows (Page 3, Allegation IV):

That the defendant unlawfully and negligently

1. Constructed and maintained the aforesaid transmission wires of dangerous voltage by failing to insulate the same at the poles and arms upon which they rested and where the employees of the defendants were liable to come in contact therewith;

2. Strung said dangerous voltage wires at an insufficient distance from the poles and supports to permit repairers to freely engage in their work.

3. Constructed, maintained and mingled dead wires strung upon the same support with said live wires;

4. Failed to designate the arms or supports bearing said live wires by color or other designation;

5. Failed to use any device, care or precaution to protect the safety of life and limb of the employees of the defendants in the use or repair of said dangerous voltage wires.

It is further charged, at Page 4, Allegation VII, that while the plaintiff was working for the defendants as a common laborer.

6. He was ignorant of the use of electricity and inexperienced in the art of construction of electric wires or electric currents and in handling wires charged with electricity;

7. That defendants, knowing that plaintiff was ignorant of the use of electricity and inexperienced in the art or construction of electric wires or electric currents and in the handling of wires charged with electricity, negligently and carelessly directed the plaintiff to assist a foreman of the defendants in placing insulators on said alternating currents of live wires at a place where they were defectively constructed and maintained;

And at Page 5, Allegation VIII, the charge is that defendants

8. Negligently and carelessly required the plaintiff, under direction of their foreman, to climb the poles sustaining said live wires, using climbers and without any ladder or other apparatus to sustain his weight; and

9. Require him to lift one of the wires; and

10. Negligently and carelessly failed to turn off the electric current from said live wires; and

11. Negligently and carelessly failed to provide any means to protect the plaintiff from being injured by said live wires.

And at Page 5, Allegation IX, it is charged that the plaintiff, while assisting the foreman,

12. Held the same (live wire) in his hand while the foreman was endeavoring to place an insulator on the arm carrying the same; and

13. While so holding said live wire, without any negligence on his part and without knowing that it

was dangerous so to do, the plaintiff received an electric shock.

These are all the charges of negligence contained in the complaint. We will examine them *seriatim*.

We desire the Court to bear in mind that the complaint does not state facts sufficient to constitute a cause of action, in this: it fails to allege when Bisher received the double contact or what caused him to receive it.

The evidence does not disclose how, or why, or when, or in what manner, or in the discharge of what duty, he became entangled in the wires. Therefore, the complaint is clearly insufficient.

### POINT IX.

A complaint must show negligence of the defendant which is the proximate cause of the injury to plaintiff before the defendant can be mulcted in damages.

Proof and pleadings in Accident Cases, Sec. 138, page 140.

Coming down to the allegations of the complaint, none of them are sustained by the evidence.

They are as follows:

We will consider charges 1, 2 and 13 together.

That the defendant unlawfully and negligently

1. (Page 3, Allegation IV). Constructed and maintained the transmission wires \* \* \* \* by failing to insulate the same at the poles and arms upon

which they rested and where the employees of the defendant were liable to come in contact therewith.

2. Strung said dangerous voltage wires at an insufficient distance from the poles and supports to permit repairers to freely engage in work.

13. While so holding said live wires, without any negligence on his part and without knowing it was dangerous so to do, the plaintiff received an electric shock.

There is no allegation that he received the shock by reason of the alleged defective construction of the line, nor does he at any place charge or attempt to show how or why he touched two wires at the same time.

But the question of the sufficiency and proper construction of this line is amply disclosed by all the evidence.

The particular cross arm is in evidence; was produced by the defendant, introduced (Pages 53-54) and marked Mutual Exhibit B-1 (Page 205) and is of the following size:

- A. About four feet long (Page 51).
- B. Carried three wires (Page 51).
- C. There were four pegs on it (Page 54).
- D. One peg never had an insulator on it (Page—).
- E. These pegs were twelve inches from the center of one to the center of the other (Page 57).

It is shown that with this extra unused peg, the middle wire could be lifted from the peg on which it was stationed and lifted clear over the pole and clear

over, beyond the unused, or middle, or mean, pegs, thus leaving a clear space of **THIRTY** inches between the farthest wire and the inside wire as a working space (Record, page 67):

Q. Now, between these pegs, from the outer peg on either side of the pole, across the pole in the center and beyond the second peg from either end is a distance of 30 inches, is it not, approximately?

A. Just about.

The pole on which this cross arm rested was eight inches in diameter across the top.

Witness Bisher (Page 68):

Q. How large was this pole to which the cross arm was attached?

A. I think the top of it was about eight inches.

Witness Sloper (Plaintiff's expert) Pages 112-113:

Q. Here is an arm that is four feet in length. State to the jury whether that is a safe length of a cross arm for four pegs on it, with three wires?

A. Well, I would consider it very close.

Q. What do you mean by very close?

A. Between the wires.

Q. Between which wires?

A. Between all of them to be safe to work between.

Q. If it measures thirty inches from the post No. 3 to the end post on either side, with only three wires, leaving a thirty inch center, you call that a very close place to work?

**A. THIRTY INCHES IS THE REGULAR SPACE TO WORK BETWEEN.**

Q. Then it is not close, is it?

A. Those two wires isn't close. But the outside one is the one I have reference to.

Q. Suppose on this cross arm as it is before you, we should take the left hand end of it—there is a wire at the outer peg, and the next peg on the inside is 12-inch center, and suppose that a lineman should just lift that wire over that pole and leave it over the third peg, he would still have the thirty inches there, wouldn't he?

A. Yes, sir.

(Page 113).

Q. He wouldn't be crowded for space, would he?

A. No.

Q. Be plenty of room, wouldn't there?

A. Yes, ought to be.

Q. Be perfectly safe, wouldn't it?

A. Yes.

Q. So there could be no complaint made as to lack of space, could there?

A. There is thirty inches. That is the rule.

.Witness Harbert (Defendant's lineman), Page 149:

Q. Referring to this specific line here, will you tell the jury—illustrate, just step down, please, to this arm, will you, Mr. Harbert, and stand facing the jury. (Witness comes down.) Now, we will say you are up on a pole.

A. Well, if I was on a pole, the first place I would be standing would be—a wire here and a wire here, a wire here—I have my arm over this wire, and do my work right here.

Q. In that 30 inch space?

A. In that 30 inch space. Here is the other wire over in here. I put my arm over this wire, and do whatever work I have to do.

Q. Crowded for room at all?

A. No, I don't see how I would be crowded. Plenty of room there with 30 inches.

Q. That is the regulation distance, isn't it?

A. Yes, I could swing out here as far as I wanted. If I didn't have enough room, I could swing out here two feet, if I wanted to, and work this wire here. But I should consider that is a fair distance anyhow. I don't need to.

Q. No danger of any induction from one wire to another, is there?

A. It would take about 200,000 volts to arc that far.

Q. To arc a foot?

A. Yes. It takes about 210,000.

Q. You never heard of arcing from one wire to another where there is thirty inches between?

A. No.

And at Page 151, same witness:

Q. Now, after you had finished on the outside wire over there, will you demonstrate to the jury how you would fix the inside wire?

A. Well, after that wire is finished there, standing here, the other wire is out there, I untie this wire and take it—of course I am down about this position—lift it, lay it over there, swing it over here somewhere, and go to work on this wire. The wire is on the other side of this plate.

Q. That gives you a thirty inch space again?

A. It gives me thirty inches, yes.

Q. Safe, is it?

A. I don't see how it can be otherwise, 18 inches across.

Q. Isn't that the customary way of handling such things as that?

A. Well, in this case it is, yes. It is a protection. It is not necessary. I could take and work four wires on there just as easy, but where there is only three wires, it might take a little extra precaution.

Q. So that with three wires on that four pin cross arm, you had more space than is customary?

A. Yes, it was a four pin cross arm.

Q. How far from centers to centers?

A. 12 inches, 18 inch in the middle, something like that.

Witness Myers (Defendant's expert), Page 205:

Q. How long is the standard cross-arm?

A. Generally call it a four pin cross-arm, twelve inches between arms.

Q. I will show you this cross-arm that we call Mutual Exhibit B-1, and ask you from your observation of that—we agree it is four feet?

MR. RICHARDSON: Four feet.

Q. Is that what you call a standard cross-arm?

A. It is generally the standard cross-arm, four pin arm.

(Witness examines cross-arm and says:)

A. Well, this pin looks as if it never had an insulator on it.

Q. That would be what you call three wire on that, wouldn't it?

A. Three wire, yes.

Q. Now, you see also where that has been up against the pole, don't you, Mr. Myers? I will ask you to kindly tell the jury whether or not it is a safe place, whether the wires are too close as you see those pins, too close for a lineman to work in safety if he is putting on new insulators?

A. No, it is not. The lineman can work and transfer his wires across there and keep in a safe place.

Q. Keep practically a thirty inch space to work in, can't he?

A. Yes, sir, all the time.

Witness F. A. Hull (Defendant's expert) Pages 223-224:

Q. Now, in constructing these lines, you became acquainted, did you not, with the general character of what they call a standard cross-arm?

A. Yes, what we call a standard cross arm, I have, yes.

Q. The cross-arm that I refer to is this one over here, Mutual Exhibit B-1, conceded to be four feet

in length. Is that the customary length of the standard cross-arm?

A. Yes, for that kind of a line, I think it would be.

Q. And you have examined that? You can see from where you are, whether the pegs are set about customarily? Is that right?

A. About 12 inches, yes.

Q. Now, I will show you some pictures, Mr. Hull. They are marked down at the bottom in lead pencil, C, D, and E, conceded to be pictures of this transmission line. Have you ever worked on transmission lines out in the country like that shows this to be?

A. Exactly the same kind.

Q. Where?

A. Chehalis, Kelso.

Q. How high a voltage was carried over the wires at those places where you worked?

A. We carried regular 2300 there. That is, that type of line carried 2300.

Pages 227-228:

Q. Now, with this standard arm, Mr. Hull, these pegs, the outer pegs, are twelve inch centers. The one across the middle I didn't measure, but the two outer ones are twelve inch centers, with three wires on there, with thirty inches from peg, skipping from one peg over to the other one, would you consider that too close, or plenty of space, or what would you, to work?

A. I would consider it a very safe line. I have worked in lots tighter places than that would be,

especially from what your pictures show, with only one cross-arm, a very safe line. In other words, I would consider it a snap as a lineman, to work on that kind of a line.

Witness Buxton (Defendant's Electrician), Page 260:

Q. I am talking about the distance it is when you can lift one and put it over, is 30 inches a good space to work in?

A. It is not cramped at all. It is a good space. There is nobody asks for more that I know of.

Q. That is as much as you ever heard given to a man, isn't it?

A. Well, I don't know as I ever heard of more or less, or anything different being asked for.

Q. Anyway, it is plenty of room in there when they take them and push them apart?

A. Yes, sir, there is no occasion for a short circuit. A man can watch himself so he will get along without any danger.

And at Page 284 (cross-examination):

Q. Now, you said that this was a standard gauge cross-arm, did you, Mr. Buxton?

A. Yes, sir.

Q. How do you know that it is a standard guage cross-arm?

A. Because it is what we used in the Coeur d'Alenes, and through the Big Bend. It is the same thing in this western country. Now, back east, we didn't use that same cross-arm.

Q. Now, what did you use back east?

A. We had a seven pin cross arm.

Q. Seven foot?

A. Seven pin. (etc.)

We submit the above evidence as totally disproving charges 1, 2 and 13, of the complaint. There is no evidence whatsoever to sustain these three charges.

### **COMPLAINT FURTHER CONSIDERED.**

#### **Charge 3, Page 3, Allegation IV.**

The defendant is charged with having constructed, maintained and mingled dead wires strung upon the same support with the said live wires.

The evidence discloses that on this same pole there were the three high tension transmission wires on this cross-arm, and that the only other wire on the pole was a telephone wire **SEVEN FEET BELOW**.

Witness Harry Harbert (Defendant's lineman),  
Page 201:

Q. Now, how far were those telephone wires from the cross-arm bearing and supporting the electric wires?

A. From the wire they are seven feet.

COURT: Seven feet below?

A. Yes.

Q. You are positive about that?

A. I measured it.

COURT: Seven feet below?

A. Seven feet below the wire.

Q. Below the cross-arm or the wire?

A. Below the wire.

Q. Seven feet below the wire?

A. Yes, sir.

Q. You measured that?

A. I measured that.

The above evidence is uncontradicted, and the testimony fails to show any claim that the alleged "dead wire" had any participation in the injuries. We submit, therefore, that charge 3 is wholly unsustained.

## **COMPLAINT FURTHER CONSIDERED.**

### **Charge 4.**

At Page 3, Allegation IV, the next charge is that the defendant "failed to designate the arms or supports bearing said live wires by color or other designation."

The General Laws of Oregon, 1911, Page 16, require "That (17) all arms or supports bearing live wires shall be specially designated by color or other designation which is instantly apparent, and live electric wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock."

The object or purpose of the color on the cross-arm is to inform the laborers of the presence of live wires.

But in this case it is conclusively shown that Johnnie Bisher actually knew and admitted that he

had knowledge, at all times, that these transmission wires were live and that he was cautioned not to touch two of them at the same time. If this is true, then the objects and purposes of all the paint and color on earth have been achieved, and it is not claimed that by reason of the absence of the color scheme that he touched live wires, mistaking them for dead ones.

Witness John L. Bisher, Jr., (Plaintiff), Page 61:

Q. You don't know how you were hurt?

A. I don't know how this came in contact, this hand at all.

Q. You do know that you had to touch two wires to get a shock, don't you?

A. That is what Mr. Buxton told me.

Q. They always told you not to touch two wires?

A. Yes, Mr. Buxton told me.

Q. You didn't have any duties that required you to touch two wires, did you, at the same time?

A. No, sir.

Q. You knew these wires were live, didn't you?

A. Yes, sir. He told me they were 2300 volts.

This bit of testimony shows not only the knowledge on the part of Johnnie Bisher but the caution on the part of the defendant and the negligence of the part of Bisher.

At Page 69:

Q. How long had you known that those wires carried that voltage. Did you know it every day you worked there?

A. Oh, I had known it ever since I had been in the country—I heard that.

Q. Of course you had known that electricity was very dangerous, haven't you?

A. Yes, sir.

At Page 86:

Q. You knew at all times when you were working there that 2300 volts was a very dangerous voltage, didn't you?

A. Mr. Buxton told me that if I shorted, it would kill me.

\* \* \*

Q. But they did tell you that 2300 volts would kill you, didn't they?

A. Mr. Buxton, the man sitting there, told me if I shorted the wires, touched two at once—

Q. That is what you mean by shorting the wires?

A. Yes, sir.

Q. That is what you call a short circuit, isn't it?

A. Yes, sir.

Q. So, when speaking of it, you say short and shorted the wires.

A. He said if I would short the wires that it would kill me.

With this direct admission of knowledge on the part of the plaintiff, how can it be claimed that the failure to paint the cross-arms was the proximate cause of the injury?

We dismiss charge of negligence No. 4 as totally immaterial in this case.

**COMPLAINT FURTHER CONSIDERED.**

At Page 3, Allegation IV, it is also charged that the defendant failed to use any device, care or precaution to protect the safety of life and limb of the employees of the defendant in the use or repair of its dangerous voltage wires.

Also, at Page 4, Allegation VII, it is charged that the plaintiff

“Was ignorant of the use of electricity and inexperienced in the art or construction of electric wires or electric currents and in handling wires charged with electricity,” and that the defendants, knowing of his ignorance, inexperience, etc., “directed the plaintiff to assist a foreman of the defendant in placing insulators on said alternating current of live wires at a place where they were defectively constructed and maintained.

We submit the above charge of the ignorance of plaintiff on the evidence quoted.

He knew that 2300 volts were on the wire; knew such voltage was dangerous; that a short circuit would kill him; he was cautioned not to touch two wires at the same time, and was told of the danger.

**Charges 5, 6 and 8.**

Charges 8, Page 5, Allegation VIII, is that the defendants “negligently and carelessly required the plaintiff, under the direction of their foreman, to climb the poles sustaining said live wires, using climbers and without any ladder or other apparatus to sustain his weight.”

Thus, at charges 5, 6 and 8, the gravamen is that the defendant failed to supply the instrumentalities for work or protection.

It is said that the defendant failed to furnish the following instrumentalities:

A. Step-ladder.

We challenge the record to show any evidence that will sustain the use of any ladder of any kind or character in the work which was done.

The boys used the iron climbers instead, and this was uncontradicted.

B. Insulated nippers.

C. Climbers.

D. Straps to hold them to the pole.

E. Body protectors, or sow-bellies.

F. Rubber gloves.

Thus on charges 5, 6 and 8, the gravamen is that the defendants failed to supply the instrumentalities for work or protection.

It is stated that the defendants failed to furnish the following instrumentalities:

A. Step ladder.

We challenge the record to show any evidence that will sustain the use of any ladder of any kind or character in the work which was done. The workmen used the iron climbers instead, and this is undisputed.

B. Insulated nippers or pliers.

C. Straps to hold the workmen to the poles.

D. Body protectors, or sow-bellies.

E. Rubber gloves.

We shall consider these instrumentalities, and their relation bearing upon the injuries separately. We shall discuss this phase of the matter, bearing in mind the well-known rule, **that in negligence or failure of duty of the master, is material in no case unless it is the approximate cause of the injury.**

A. Step ladder.

We dismiss the charge as wholly unsustained and frivolous.

B. Insulated nippers.

Although great stress is laid upon the failure to supply insulated nippers, and much evidence, pro and con, was given at the trial, the Plaintiff says:

Page 49.

Q. Did they furnish you with any tools?

A. Well, Mr. Harbert, Harry Harbert, gave me a pair of climbers and a belt and a pair of pliers.

Q. The pliers, did they have insulated handles?

A. No, sir, the pair of pliers he gave me, they were **dull**, and the climbers were **dull**, and I sent down home and got a pair I had used in climbing telephone poles, they were sharp, and the pliers and the belt—I wore the belt that he gave me. And the pliers, I sent down home and got a pair of pliers, because those that he gave me were old, and I couldn't use them, and they were so large I couldn't hardly use them.

Q. Did you try to use the climbers that he gave you?

A. I climbed one pole with them.

Q. Why couldn't you use them?

A. They were too dull. You cannot use climbers when they are very dull, you might slip. I climbed the pole right in front of the store when we was putting the lights in the saloon.

MR. SMITH: We move to strike out all this testimony about the climbers and the belt and the pliers, for the reason that there is no risk alleged to have been occasioned by them at all. It simply encumbers the record.

COURT: I understand they allege that he was not supplied with the proper utensils.

MR. RICHARDS: That is it, your Honor.

MR. SMITH: But if your Honor please, there is no charge he was hurt by reason of it. His charge is he was hurt by electric shock. He doesn't claim they had anything to do with the shock.

COURT: I will overrule the objection.

MR. SMITH: Note an exception.

This evidence shows that Johnnie Bisher supplied himself with **suitable** pliers and climbers, and it is not claimed the belt was defective.

The evidence does not show that the absence of any of these instrumentalities so far considered have anything to do with the injury. Witness Johnnie Bisher, page 61.

Q. You don't know how you were hurt?

A. I don't know how this came in contact, this hand at all. See evidence heretofore quoted.

Page 68.

Q. Now, at the time you were hurt, you had on climbers, didn't you?

A. Yes, sir.

Q. These sharp peg things that you climb with?

A. Yes, sir.

Q. And you had on a big strong belt?

A. Yes, sir.

Q. You say those were your own climbers?

A. My climbers.

Q. And they were sharp?

A. They were sharp, yes, sir.

Q. So your feet didn't slip, did they?

A. No, sir.

Q. And your belt didn't slip?

A. No, sir.

Page 71.

Q. Now, you spoke of a conversation with Mr. Buxton? Did he ever give you any climbers.

A. Mr. Buxton?

Q. Yes.

A. No, sir.

Q. Did he ever tell you that it might become necessary for you to climb a pole?

A. He told me just to help Harbert.

Q. Well, now, will you kindly answer my question? Did Mr. Buxton ever tell you that you might have to climb the pole?

A. No, sir.

Page 89.

Q. Concerning these pliers, you were not using pliers when you were hurt, were you?

A. I did just a little before.

Q. At the time you were hurt, you were not working with pliers, were you?

A. No, sir, I just started to lift up the wire.

Q. And the pliers that were used there by Harbert didn't have any insulated handles, or anything of that kind, did they?

A. No, sir.

Q. So you were not hurt by reason of the pliers?

A. No, sir.

We further lay out the following charges:

B. Failure to furnish insulated nippers.

C. Straps to hold to the pole

because no injury arose from either source.

This leaves for consideration, the following instrumentalities:

D. Body protectors or sow-bellies.

E. Rubber gloves.

Looking to the evidence on these two instrumentalities, we find:

### **BODY PROTECTORS (SOW-BELLIES).**

Witness Johnnie Bisher, page 89.

Q. And at one time also you spoke of a pad, or

a protection, I believe you called it a belly pad, that men sometimes use?

A. I didn't say anything about a belly pad.

Q. Well, it was brought out in the opening statement. Do you know where they use those pads, and under what circumstances?

A. No, never heard of a belly pad.

Q. You know they don't use them out in that transmission work out there, where there are only three wires up there, don't you?

A. I never seen any to know what they were.

Q. And you were not hurt by reason of not having a pad in front of your body? It was your arms that came in contact with the wire?

A. Yes, sir.

We take it that this answer lays out of the case, the question of the body protector. This then leaves for consideration, the last point, to-wit:

Witness Sloper (Plaintiff's expert), page 121:

Q. Suppose a case like this, Mr. Sloper: That here is this cross-arm four feet long. Here is the outside wire in place, wired down to this insulator; a similar one on the other end; and they are working on the middle wire—how would they use that thing then?

A. Lay that over the middle wire, and take the outside one off and put on the other insulator, put it up, tie it in, and take the sow-belly off.

Q. No, the outside wires are already fixed, and they are working at the middle wire?

A. They wouldn't need the sow-belly then.

Q. Exactly. That is all.

## THE FAILURE TO SUPPLY RUBBER GLOVES.

Concerning this point, the evidence is as follows:  
Witness Betts, page 319 (Defendant).

Q. Did anyone ever tell you, Mr. Betts, or did you know that Johnnie Bisher was purporting to work up on a line like that?

A. No, I did not.

\* \* \* \* \*

Q. Did you have materials there, or would you have furnished any man up there rubber gloves, if he had asked for them, or wanted them?

A. I would. I asked Harbert if he wanted them. He said no, that he would rather not use them.

Witness (page 321) states that he offered Harbert rubber gloves because he wanted to protect him as much as possible from shock, and says:

Q. How came you to suggest rubber gloves?

A. Why, because I thought it might help him. I knew that rubber gloves were made.

Witness says that he had none, but he knew that they were sometimes used, and says:

Q. Did you ask him (Bisher) if he wanted any rubber gloves, or needed any?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Why didn't you?

A. Because I had no idea that he was going on the pole.

Q. No idea he was going on the pole?

A. No, sir.

Q. Why didn't you think he was going on the pole, Mr. Betts?

A. Because Mr. Buxton said to me, "I have a good man to change that pole line." I said, "Who is he?" He says, "It is a young man from the valley by the name of Harbert." I said, "That is good," and I thought that Mr. Harbert was going to fix that line.

Witness Buxton. (Defendant's electrician, age 35, 11 years' experience, electrician last six or seven years).

Page 264.

Q. Would you work at that work in the latter part of July, in that section of the country up there, that arid or semi-arid belt, would you work on this putting in of insulators with rubber gloves?

A. No, sir, they could not. It would take more than a small raise in salary for me to be bothered with them, and suffer the heat that you would get off them, up in that country at that time of the year, off rubber gloves.

Q. Make your hands sweaty, would they?

A. Why, they would get sore. They would not only sweat, but they would be so tender that they would be sore with rubber gloves.

Witness continues, stating that in climbing the

poles, etc., with rubber gloves, the splinters would puncture and tear the gloves and it would then be worse than nothing, he says:

Q. Now would you consider rubber gloves a safety protection up in work of this kind, or would they be necessary at all at that time of the year.

A. I would say that they would not be necessary, and it is like this: If a man had a job there that he considered a little bit close, something like that, there would be one point of protection—that would be one point of protection.

Q. That is where he is liable to catch two wires by the hand—something of that kind?

A. Yes, sir.

Q. Where he has lots of room in there, there is no use of it?

A. In that kind of construction, a man don't want them that I know of.

Page 273, witness says:

Q. Now, was there any work that Johnnie was required to do there, or that you knew he was doing, that required any rubber gloves, or any wrapped or insulated pliers, or any sow-belly, or anything of that kind?

A. There was nothing that I knew of that he was doing that would require anything of the kind, and if I had suggested that he have rubber gloves, or anything of the kind, why, no doubt in the world but what he would have turned it down.

Page 281.

Q. Now, what does a lineman wear rubber gloves for?

A. Well, in case that they get cramped into a cramped place, where they don't have to work, don't have a chance to guard themselves, and it is almost impossible for them to get through without touching one side or the other, or very small chances for them to get through, they will wear rubber gloves.

Witness Frank Hull (Defendant's electrician, age 28 years, 9 years' experience).

Page 225.

Q. What is the highest voltage you have handled on bare wires?

A. The highest voltage that I have ever handled has been 2800-2500. . .

Q. You used rubber gloves, did you?

A. No.

Q. You handled that amount with your bare hands?

A. Yes. I have used rubber gloves, of course, but that was under certain conditions.

Q. What were the conditions?

A. While we would be working on a junction pole, or if it was raining real hard and everything was wet, we had to go into it at night, I would take gloves when I couldn't see, on shooting trouble.

Page 230 (Johnnie Bisher was doing the work of a grunt).

Q. Now, you have worked enough around lines to

know what the boy is kept for, the ground man, the grunt, as you call him. Is there any duty that he is performing that requires him to get up on that pole?

A. No, there is no duty. If he is a grunt, he has no business up the pole.

Q. Do they furnish grunts with rubber gloves?

A. No.

Page 234.

Q. Now, you stated, Mr. Hull, that you had worked with gloves—you had used gloves?

A. Yes, I have used gloves.

Q. What did you use the gloves for?

A. Well, if at night, I would go on a pole that had a great many wires, or raining or wet, I would use the gloves if it was dark.

Q. What did you use the gloves for? What was the object in using them?

A. Well, they are more or less protection.

Q. It is insulation, Mr. Hull, isn't it?

A. Rubber is an insulation, yes, sir.

Q. If you have rubber gloves, and they are in good condition, you can handle live wires without incurring the same dangers that you would if you didn't have the gloves?

A. Yes, sir, they would be of some assistance.

Witness F. E. Myers (Defendant's expert, age 38, electrical engineer, 23 years' experience).

Page 207.

A. Well, on that pole line, I don't see what use he could make of rubber gloves there, because he is

up on a pole there, and nothing else around him but three wires. I do not see the necessity for using rubber gloves.

\* \* \* \* \*

Q. Now, you state that you wouldn't use rubber gloves if you were a lineman up there?

A. No, I would not.

Page 208.

Q. With that condition, with those poles about 25 feet to the cross-arm—is that correct, gentlemen?

MR. RICHARDSON: Yes.

Q. Twenty-five approximately—it may be a foot less, but about that—would you see any use to which a lineman would put rubber gloves to work out there, if he was given them, putting on insulators and changing them?

A. No, I don't think he would in that warm weather.

Q. Why wouldn't you want rubber gloves?

A. Perspiring of the hands cannot deceive me on account of a puncture in the cloth.

Q. You try to keep your hands dry?

A. Yes.

Page 219.

Q. Now, it is customary, Mr. Myers, for electric linemen to use rubber gloves?

A. Well, some do and some don't.

Page 220. Witness says that he worked eight years ago for the Portland Railway, Light & Power Company, and says:

A. No, they didn't furnish no gloves in those times.

Q. And didn't require the employees to use gloves at this time?

A. They left that to the discretion of the lineman. If he wished to use gloves, why he did.

Q. Is there a practical, experienced lineman without rubber gloves now?

A. Why, I don't see any of them wearing them.

Witness then named William Castleman as a practical lineman, working for the Portland Railway, Light & Power Company, who works without rubber gloves, and says:

Page 221.

Q. What kind of work?

A. He does any kind of work on the lines, handling from 2300 volts up for them.

Q. And he doesn't use rubber gloves?

A. I have never seen him use rubber gloves yet.

Q. Did he tell you that he didn't use them?

A. I can see him with my own eyes when I see him working.

Witness W. H. Harbert (Defendant's lineman, age 26, electrician, experience seven years, p. 145).

Page 156.

Q. Now, you heard some testimony here about rubber gloves?

A. Yes, sir.

Q. Did you ever work with them?

A. No.

Q. I am scared of them.

Q. Tell the jury why.

A. Well (pgs. 156-167), a man might put a pair of rubber gloves on, come up a pole, and you would puncture them, take hold of the wires, why, it would be the same as having a bare hand, if there was any kind of holes in them at all—if there was any contact, if you had the contact. With one wire there is no contact—12,000 volts is just as easily handled as 2300. I handled 7000 volts just a little while before I came down here; damp weather, too—snow and cold. But if you take the gloves, and slivers in the poles, or anything like that cut the gloves, a man might take chances with them, you know, thinking they were safe.

Q. Do they make your hands sweat?

A. They are considered a death trap with most linemen; that is, hot wire men.

Q. You are what they call a hot wire man?

A. Yes, sir.

Q. Did this company up there ever direct your attention to the gloves?

A. Yes, sir, Mr. Betts asked me if I wanted rubber gloves.

Q. What did you tell him?

A. I told him no.

Q. You were the lineman, the only lineman there, were you, at that time?

A. Yes, that is what I hired out for.

Q. You say you didn't use these gloves?

A. No, sir.

Page 174.

Q. Did you ever hear of a helper using rubber gloves?

A. Never did.

\* \* \* \* \*

Q. Do they furnish the helper—is he exposed in any way to any danger in his duty on the ground just carrying the material?

A. No.

Page 188.

Q. Did you say anything to him when he got up to the top?

A. I think it was on that very pole—I wouldn't swear to it—that I cautioned him about the wires.

Witness L. H. Kennedy (Plaintiff's expert, electrical worker, 7 years' experience, 4½ years lineman, p. 121).

Page 122.

Q. Now for repair men to make repairs on a line of that kind (referring to the line in question), what would be considered by practical and experienced linemen as being the proper tools and appliances to work with, to make repairs and change insulators?

A. Well, I would consider the sow-belly and a pair of rubber gloves the most essential; also insulated pliers; but then I would insist on the sow-belly, and a pair of rubber gloves, or I would not work on it.

Page 124.

Q. What is the custom of the average employer of requiring linemen to use rubber gloves?

A. In the last three years, they have all forced me to **TAKE** rubber gloves or not work.

\* \* \* \* \*

A. (Page 125) It is the custom to require them to use rubber gloves, to accept rubber gloves. **IT IS THEIR OPTION AS TO USING THEM.**

Q. Even in working on transmission lines that are insulated?

A. Yes, sir.

Witness L. W. Sloper (Plaintiff's expert, claims 11 years' experience). Page 104, witness says that he has handled 2300 volts, but not higher.

Q. (Page 105 I will ask you, Mr. Sloper, if a three-phase transmission line, such as has been described by the witness in this case that you have heard, consisting of copper wires a little larger than a lead pencil, strung upon poles about 25 feet from the ground and on a support known as a cross-arm, such as the one in evidence here, said transmission lines being the distance as you observe between these two insulators on this Exhibit "B-1" of both plaintiff and defendant, the cross-arm being nailed to a post about eight inches in diameter, and the third wire being placed on an insulator on this end of the cross-arm, would it be in your opinion, safe for a repair man or any one else to make repairs, or to change these insulators, on uninsulated wires carrying a

voltage of electricity as high as 2300 volts? State whether or not in your opinion, a workman or repair man, without the use of rubber gloves, without the use of insulated handles on pliers, or any other lineman protectors, could make those changes without endangering themselves to great injury and shock by electricity?

MR. SMITH: Objected to as invading the province of the jury, and as incompetent.

\* \* \* \* \*

A. I should consider it very dangerous.

Q. Explain to the jury why you would consider it dangerous.

A. Well, the lineman's pliers are nine inches long, in the first place, and when he unwraps the wire off the insulator, he does it with his pliers, especially if he has on rubber gloves, which we always have in handling that kind of voltage, and unwrapping that, the pliers nine inches long, and the wire unwraps three inches, as he is unwrapping it around he is liable to hit his hand on the other side, in the first place.

Q. What are the customary tools and appliances that an electric lineman in working upon a power line that I have described, in which the wires are uninsulated, what are the customary tools and appliances that a lineman will use?

A. He first has his pliers insulated, and the company always furnishes rubber gloves, and in a job like that he should have what they call a sow-belly. It is about four feet long, made of heavy rubber,

tested to 60,000 volts. The first thing he does is to put that sow-belly on the middle wire. Then he can learn over and work on the outside wire with safety, and change that insulator; and then take his sow-belly off and change the inside one, and then turn around and change the other one.

### ARGUMENT.

Witness Sloper (Plaintiff's expert), page 121:

Q. Suppose a case like this, Mr. Sloper: That here is this cross-arm four feet long. Here is the outside wire in place, wired down to this insulator; a similar one on the other end; and they are working on the middle wire—how would they use that thing then?

A. Lay that over the middle wire, and take the outside one off and put on the other insulator, put it up, tie it in, and take the sow-belly off.

Q. No, the outside wires are already fixed, and they are working at the middle wire?

A. They wouldn't need the sow-belly then.

Q. Exactly. That is all.

Cross Examination, page 110.

Q. How long have you been in the electrical business?

A. About eleven years.

Q. What have you been doing?

A. Lineman.

Q. What school are you a graduate of?

A. I didn't graduate from any school.

Q. No, I thought so. Did you ever do anything else except work as a lineman?

A. Yes, sir.

Q. What?

A. I worked on a farm.

Q. From the farm you went to this electrical work?

A. Yes, sir.

Q. That is all you know about it?

A. That is all I know about it, is the general work of a lineman, that is all.

Q. (Page 112) Suppose at the time a man is hurt, he is not using his pliers, and he couldn't use his pliers on the work he is doing, the fact that the pliers are wrapped wouldn't save him, would it?

A. No.

\* \* \* \* \*

Q. Where are you working now?

A. I am not employed at the present time.

Q. How long since you have had employment?

A. A couple of months.

Q. Where did you work as lineman when you quit?

A. Bellingham, Washington.

Q. For what company?

A. Bellingham and Snoqualmie—Stone & Webster.

Q. Did you work as lineman on electric transmission line, or telephone line?

A. Transmission line.

Q. How long did you work there?

A. About two weeks.

Page 113.

Q. Do you know any of the electricians of this city?

A. Yes, sir.

Q. Any of the men in charge of affairs?

A. Yes, sir.

Q. What is the highest voltage you know they can handle when they are handling it alone?

A. Twenty-three hundred is the highest they handle, take any man with any sense. When he handles any more than that he is taking great risks of life.

Q. Why?

A. Well, because you cannot tell what it is going to do.

\* \* \* \* \*

Page 115.

Q. You take a dry pole in the latter part of July, on a cross-arm like you see this is, a man on the pole away from the ground 25 feet, it would be perfectly safe to touch one of those 2300 volts with one hand, wouldn't it?

A. No, sir.

Q. Suppose they have done it without injury, would that be any proof to you?

A. He might do it for a month and then he might get hurt.

Q. Because of his carelessness?

A. He couldn't help it. I have got shocked in

very dry weather, when I have been handling it for a long time. Then I would take hold of it, and it knocked me pretty near off the pole.

Q. You would handle it safely 99 out of a hundred?

A. I have handled it, but it was dangerous to do it.

Q. Handle it safely 999 times out of a thousand, wouldn't you?

A. No, sir, not that big a percentage.

Q. How do you account for the shock when things are in perfect condition, with a dry pole, dry cross-arm, in the middle of summer?

A. You cannot tell when the pole is always dry. It is liable to be wet. You think it is dry, and it ain't.

Q. It is because the pole was wet and you didn't know it you got shocked?

A. Yes, sir.

Q. Then you didn't answer the question, whether or not it wasn't safe to handle it with a dry pole?

A. If the pole is absolutely dry, and you know it is dry, and you cannot tell.

Q. Suppose it is dry and you don't know it?

A. If it is dry, **YOU ARE ALL RIGHT.**

Q. (Page 117) You say the company has always furnished rubber gloves?

A. Yes.

Q. How big gloves?

A. How big?

Q. Yes; how far up do they come?

A. They have long cuffs on them. Come up about there, I think.

G. Gauntlet gloves?

A. Yes, here is a pair of them.

Q. What effect do they have on your hand when you work?

A. Well, they are clumsy to handle.

Q. Hands sweat, do they?

A. On a very hot day they do a little.

Q. What company furnishes those gloves, do you know?

A. All of them do.

Q. Do they furnish them to boys that are required to work on the ground and carry material from pole to pole?

A. If they have got any wires to handle, they do.

Q. Well, will you answer the question? If they carry materials from pole to pole, do they furnish them for that?

A. No, not to carry material with.

Page 119.

Q. Isn't it highly probable—not only possible, but highly probable, and oftentimes—that a man short-circuits by taking hold of a live wire when he is simply touching nothing, except his feet are holding onto the post, with his climbers stuck into the post?

MR. SMITH: Objected to. This man is an expert. That is not the fact in this case at all. It is admitted that the boy touched the other wire. He has admitted that himself.

MR. RICHARDSON: No, your Honor, I beg your pardon—I have not heard any one admitting it. There has no one particularly denied it. The boy says he doesn't know. There is no evidence to show whether he touched the other wire. My theory is he shorted in, he threw both hands up, and he came in contact with both wires, it is a cinch. But what I mean is, he could have gotten a shock by short-circuiting with the post and holding one wire. That is probable. My theory is that the plaintiff received his injuries by striking two wires. That is the impression. But the question I am asking is to show that it is probable, from this expert witness, that he could get a shock from that matter.

COURT: I think that is outside of this inquiry if that is your theory about the question.

The above testimony shows conclusively:

A. That even in case they furnish rubber gloves it is optional with the workmen whether they use them.

B. That rubber gloves are not necessary in the work which is being done.

C. That no duty which the grunt does calls for rubber gloves.

At the time of the injury, Bisher says that he was lifting the middle wire with one hand, and fails to account for his other hand. The other witness, Harbert, says that he was not lifting the wire; that his left arm was thrown over the outer wire, and he (Bisher) was watching him (Harbert) working, and trying to learn all he could.

But the evidence shows conclusively that Bisher touched two live wires at the same time; and it is inconceivable for any electrician to have a duty that requires him to touch two live wires at the same time.

The evidence, therefore, shows that Bisher was not in the discharge of his duty when he touched the two wires, and it fails to show that if he had been furnished rubber gloves, he would have escaped injury, or that he would have used them and that they would have protected him.

### **AVOIDING INJURY—AN ABSOLUTELY SAFE WAY KNOWN TO BISHER.**

Bisher was experienced in climbing telephone poles; he knew that the wires were highly charged; had been warned not to touch them.

He knew that work could be done there in safety, by supporting himself as follows:

A. With one wire and not touching the other.  
or—

B. With his arm resting on the dry wooden Cross-arm and not touching any wire at all.

At the time he was hurt, there was a distance between the outer right hand wire and the middle wire, of 30 inches, in which he could have placed his body and supported himself by holding on to the pole and the cross-arm, and been absolutely safe.

If, therefore, his duties did not require him to touch the two wires, and if further, he did touch two live wires, we say that the deduction is irresistible

that he was hurt through his own negligence and being at a position where his duties did not call him, he cannot recover. He was a mere volunteer, and he cannot recover.

## **CHARGES OF NEGLIGENCE — COMPLAINT FURTHER CONSIDERED.**

The remaining charges of negligence are, page four, allegation seven, point—

7. That the Defendant, knowing Plaintiff's ignorance, required him to work among these wires, etc. That the wires were defectively constructed, etc.

9. Required him to lift one of the wires.

10. Negligently and carelessly failed to turn off the current from the live wires.

12. And further that the defendants failed to insulate the wires.

We have shown Bisher's knowledge of the situation, that he knew the very day he was working there, and long prior thereto, that these wires were carrying a high dangerous voltage, concerning which he had been cautioned.

That he was an experienced climber of poles, that his duties were on the ground, that he was given climbing instrumentalities so that he could help Harbert out in case Harbert got in trouble.

We will now consider the remaining charge of negligence, etc.

## UNINSULATED TRANSMISSION WIRES.

It is claimed throughout this case that it was the duty of the Defendant to insulate these 2300 volt transmission wires.

This charge is based upon the alleged statutory duty in the General Laws of Oregon, 1911, pages 16 and 17.

The latter part of paragraph 1, reads: "All owners, contractors, sub-contractors and other persons having charge of, or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and protection, **which it is practicable to use**, for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances or devices."

Commenting upon this law, the Court instructed the jury (Record 346): "If you believe from the evidence it was not practicable for the employer to insulate the wires at the place of the happening of the injury, and if you further believe that the weather insulation spoken of was not practicable to use at that place, then I instruct you that the law does not require a vain or useless thing to be done. All statutes must be read and construed and applied to human affairs by the rule of reason, and the duties which are imposed upon masters by what is known as the Employers' Liability Law of Oregon, are such

duties and obligations as can be performed reasonably and efficiently, and no obligation is laid upon the master to place upon his business an expense in furnishing appliances which are prohibitory either by the extreme cost or frequent renewals, which by the frequency of the renewal of such appliances would compel the employer to close his enterprise. If you therefore believe that it was not practicable for the employer to insulate the wires and keep them insulated as against shock at the place of the injury, then I instruct you as a matter of law, that it was not the duty of the employer to attempt to insulate the wires with weather insulation and you cannot consider his failure to so insulate the wires and keep them insulated, as negligence.

“You must take into consideration in this connection, gentlemen of the jury, whether or not the defendant could have insulated these wires as required by the statute and still continued his business. It it was too expensive to do that—if the expense laid upon the business by the insulation was such that the party must go out of business, or that it would render his occupation unprofitable, so that he could not operate, then you must determine from all the facts in the case whether or not he used due care and precaution—the utmost care and precaution, you might say in this case—in doing what he did do in the premises in the placing of these wires and leaving them uninsulated.”

The verdict of the jury was against the Defendant. It is our contention that the verdict is against the

instruction given, based upon the evidence in the case, which is as follows—

There was introduced in evidence a small bit of copper wire, covered with weather insulation. It was claimed by the plaintiff that the wires in the country should have been placed in with this weather insulation. Now, weather insulation is defined by Plaintiff's witness, Sloper, as follows:

(Page 107.)

Q. Now, Mr. Sloper, is it practical to insulate wires carrying a voltage of 2300 volts?

A. **Yes, sir, they are always insulated.** The pole and the wire being dry, if they had been insulated there would have been no danger of any accident.

Q. If the wires had been insulated in this case, there would not have been any accident?

A. No.

Q. If it had been good insulation?

A. Yes.

Q. Would insulating the wire have any tendency to decrease the efficiency of the plant.

A. No, sir.

Cross examination, page 107.

Q. What kind of insulation have you ever seen on a cross-country wire of 2300 volts, up in the mountains?

A. The regular insulation that they put on wires of that voltage.

Q. What is it made of?

A. It is made of cotton and tar solution made up.

Q. What you call weather insulation, isn't it?

A. What we call weatherproof, yes.

Q. That is all there is to it? It is weatherproof, isn't it?

A. It is called insulation.

Q. It simply protects the wire from inclemency of the weather, isn't that it?

A. And from the handling of it.

Q. And it is no protection whatever against handling a live wire, is it?

A. It certainly is, yes, sir.

Q. What protection?

A. If it is dry, it is absolutely safe.

Q. Do you mean to swear as an expert, that you can insulate wire carrying 2300 volts with weather insulation?

A. Yes, sir.

Q. Do you know of a single wire in the United States where it is done so as to be a protection against shock?

A. I know of where it is always done.

Q. Where?

A. In Portland and other places.

Q. What do the high tension wires that come into this city carry?

A. Ten, fifteen, twenty and sixty thousand.

Q. Clear up to 60,000. Do you know of a single 60,000 wire across the country that is carrying 60,000 voltage that is weather insulated?

A. They don't handle anything as high as that.

Q. Will you answer the question? Do you know of a single transmission wire carrying 60,000 volts, that is insulated with weather insulation, coming into this city?

A. They don't insulate high voltage wires.

Q. The higher the voltage the better it is to leave the insulation off, isn't it?

A. Well, that high it wouldn't do any good; it would burn off, it is too hot.

Q. Isn't it the fact that higher the voltage the more they leave off the insulation?

A. When you get above 2300, it is, yes.

Q. Why does 2300 happen to be your limit?

A. That is as high as they generally insulate.

Q. With this weather insulation?

A. With any kind of insulation that I know of.

Q. (Page 110) But do you mean to testify that that light weather insulation of cotton and a little tar there, is to protect men that come in contact with the wires?

A. I don't know what else it is put on the wire for if it ain't for that.

Q. (Page 116) You mean that wires that carry 2300 volts—let us see if we cannot get away from that—wires that come from that transmission wire, come into the houses, that service wire—what does it carry?

A. Some carry 11,000.

Q. That come into private residences?

A. Oh, 110 and 220.

Q. 110 and 220. That is the way they measure it in this city, isn't it?

A. Yes, sir.

Q. That is the standard under which this city is limited—three phase system, at 110 and 220?

A. Yes, sir.

Q. Those wires are weather insulated, aren't they?

A. Yes, sir.

Q. Did you ever know anybody to get shocked with that light weather insulation?

A. Yes, I have on 220.

Q. So weather insulation doesn't protect against a shock, does it?

A. Not with the insulation, I never knew them to get shocked—I didn't—no, not through the insulation they didn't.

It was established that there was a special ordinance requiring insulation in Portland, and before that time, the insulation was not used. This part will be explained later. The witness Sloper testifies:

(Page 128.)

Q. Do you know where a cross country wire is that uses the insulation?

A. Yes, sir, I do.

Q. Where?

A. Walla Walla.

Q. Over the country?

A. Running down from the plant, down Mill Creek Station down into Walla Walla.

Q. The same type and grade?

A. The same type and grade. I would not say it was there now. It was there, though.

Q. How long ago?

A. About three or four years ago.

Q. Well, now, don't you know that the modern way of handling these transmission high tension wires is to leave them uninsulated, cross country wires?

A. What we call high tension wires is high voltage wires—2300 volts always—2300 always is insulated.

Q. Always insulated?

A. Yes, sir.

Q. Do you know where the line is from here to Salem?

A. No.

Q. Salem, Oregon. Do you know where the line is around the vicinity of Pasco and Kennewick in Washington?

A. No, sir.

Q. Do you know where the line is from Yakima down to Prosser?

A. No, sir.

Q. Do you know the wires in Spokane, Washington?

A. Yes, sir.

Q. Are they insulated that way?

A. They didn't used to be when I was there.

Q. When was that?

A. It has been about eight years ago.

Q. Were you working at the business then?

A. Yes, sir.

Q. And you say they didn't insulate them that way then, did they?

A. No, sir.

Q. And you say this Walla Walla one was four years ago when you recall that?

A. Yes, sir.

Q. Do you know a transmission line that runs to Lewiston, Idaho, Genese, and around there? Do you know the Pomeroy plant?

A. No, sir.

Q. Do you know the plant at Baker City in this State?

A. No, sir.

Q. Do you know the plant of any small towns in this State, ranging from 5,000 to 15,000 inhabitants, or any of the surrounding country? Do you know what kind they use at Medford?

A. No, sir; I have been in California the last three years.

Q. What part?

A. Los Angeles.

Q. Underground wires?

A. In the main part of town, yes.

Q. You don't know whether in the cross country transmission wires in this state—you can't name one where they use that kind of insulation, can you?

A. I don't know of any 2300 volt transmission lines now today.

Q. Do you know of any 229 line that uses it?

A. No, sir, I don't.

Q. Do you know of any 301 that uses it?

A. It don't know anything under 10,000.

Q. How long would that weather insulation last?

A. Three or four years—five.

Q. Now you say that you know that that is plain weather insulation from the fact there is no rubber surrounding the wire?

A. That is called weather proof.

Q. Didn't you testify that you knew that from the fact there was no rubber surrounding the wire?

A. Yes, sir, I did.

Q. If there were rubber there it would be a better protection against electricity than it is, wouldn't it?

A. Supposed to be, yes.

Q. If that weather insulation you talk so much about happened to be a little old, it would be a deception and a snare? It wouldn't be any protection at all, would it?

A. It would be some protection. Your coat sleeve would be some protection.

Q. It would be about as much protection as your coat sleeve, too, wouldn't it?

A. If a man happened to hit his hand with that, and didn't get against the wire, it would protect him.

Q. If he didn't strike the wire, he wouldn't get shocked at all, would he?

A. If the insulation was very wet, he would get shocked if he just touched the insulation.

Witness L. H. Kennedy (Plaintiff's expert) testifying as to the particular weather proof wire in evidence, page 126.

(Page 123.)

Q. Have you with you any pieces of insulation of copper wires?

A. I have.

Q. What do you call that, Mr. Kennedy? (Referring to piece producer.)

A. That is wheather proof, triple braid, No. 1, copper solid.

Q. Is it practical to insulate an electrical wire carrying 2300 volts.

A. It is.

Q. Is that used in the City of Portland on all transmission lines carrying 2300 volts?

A. Well, that is used, the same thing—

MR. SMITH: Now, will you kindly answer the question, please.

A. A weather proof wire is used in Portland, triple braid.

Q. And you call this a triple braid, weather proof wire?

A. I do.

Q. In your opinion, if these transmission wires that have been described by the witnesses in the trial of this case would have been insulated according to this insulation, would there have been any injury?

A. There could not have been.

Q. Do you know of any other known and used insulation, that, if it had been used and had been in good repair on the same transmission system, would there have been any injury?

A. Nothing that is practically different, materially different; different insulation, but materially the same for outside work.

Cross examination, page 125.

Q. Do you know, are you familiar with the transmission lines of the City of Portland, carrying 2300 volts of electricity.

A. Well, not; no, sir.

On cross-examination the witness states that he has worked in Portland two years and a half on inside insulation, and further testifies:

Q. That was where you got this, wasn't it?

A. No, sir.

Q. (Page 126) Where did you get it, then?

A. Outside.

Q. Outside of what?

A. Outside work.

Q. Outside work?

A. Here on the Portland Railway, Light & Power Company.

Q. What I am asking you, is where did you get this?

A. I got that from the supply house.

Q. You did not take it as a part of the thing you saw in use, did you?

A. No, sir.

Q. And you know that that is used on the inside of the power house, where men are exposed to the machines right along, don't you?

A. That is used on the outside.

Q. Answer the question. Isn't this the inside insulation that they use right around the generating machinery all the time and around the transformers?

A. I think not.

Q. Do you know.

A. Not that I know of.

Q. Do you know of a single transmission line in this country where they use that on a cross country line?

A. I don't know about cross country lines.

## **DEFENDANT'S WITNESSES ON INSULATION.**

Witness Harbert (electrician), page 146:

Q. Those high voltage wires up there, were they insulated or not?

A. No—bare copper.

Q. Now, from your experience as a lineman, what will you say is the proper way as to a cross country high voltage wire, to insulate it with weather insulation or leave it bare?

A. I wouldn't have much to do with it with insulation on. That is, I would touch it more carefully than if it was bare. I prefer bare wire myself. I haven't heard in my life of a transmission line using insulated wire, and I have seen a few of them.

Q. Tell us where you have seen them?

A. Out from Portland here to Cascade Locks, all the ways along you will notice high tension line, bare copper, about No. 2, carrying about 6600 volts, I judge from the insulation, but nothing less than that. And also from Eugene to Albany, and most any of these transmission lines out of Portland here, you will find the bare copper.

Q. Why is it you prefer bare copper to this weather insulation?

A. Well, because weather insulation is good for a few months. After rain, and the dry weather, this insulation punctures. A man will take the chance with it that he would not on bare copper.

Q. It would be a deception to him, wouldn't it?

A. Yes, I should consider it dangerous.

Q. Isn't it a fact that, in your business, this weather insulation is regarded as much more dangerous than the bare wire for that reason?

A. Yes, it is regarded that way.

Q. You are always on guard on a bare wire, aren't you?

A. Yes, sir.

Q. And the weather insulation, it is impossible for you to tell whether it is good or bad—isn't that it?

A. No, you cannot tell. That is the proposition.

Q. (Page 148.) They don't use it out in cross country like this?

A. Not on high tension. The telephone company uses it in the city sometimes.

Q. (Page 149.) How many times have you handled bare wires on poles?

A. Oh, I guess on and off, seven years. I think that was about the first work I ever did.

Q. (Page 159.) How long have you worked on wires where three of them were strung on cross-arms like that? Tell the jury please.

A. I worked up there, I worked on it all the time the last eight months on this one particular job; that is, different times. I worked on it steady most of the summer. I do work on the line now. It is higher voltage, of course. We have 6000 volts on the line now.

Q. They have stepped it up to 6000, have they?

A. Yes, sir.

Q. Running over the same size wire?

A. Yes, sir.

Q. You handle these wires, 6600, the same way, do you?

A. Certainly.

Q. Any more danger with the 6600 than with the 2300?

A. Not a bit.

Q. Is it possible for you to get a shock with just one contact?

A. No, not unless the voltage gets away out of sight. Take 12,000, anything up to 12,000 volts, there is no need to worry.

On page 166, witness says relative to doing work of insulation and tying the wires, in the manner

which they did on this transmission line, and with the porcelain insulators used on the pegs:

A. I would have to cut clear through to the copper, make the tie whole. You cannot tie it with insulated wire. You have to use iron wire to tie it. And you would have to cut right through the insulation and hit the copper.

Q. The first thing you would have to do would be to remove the insulation, wouldn't it?

A. I would just squeeze the wire right through the insulation.

Q. Well, now, isn't it also true that when the weather insulation is broken once thereafter the rain or the snow or the weather conditions affect it very materially, and it deteriorates quite rapidly?

A. Yes, it deteriorates rapidly after a puncture. After the first puncture, why, it will deteriorate very fast after that.

Q. Do you know what the average life of weather insulation is, as against the weather?

A. Well, I should judge, I couldn't say for sure, but between three and six months.

A. That is as to the weather itself?

A. Yes.

Q. Well, now what would be the practicability of any company keeping its wires insulated with new weather insulation?

A. Well, if they had to insulate their wires every time that the wire punctured, they would have to

construct a new line every few months; that is, to keep it guaranteed to be insulated.

Q. Would that be practicable for any company?

A. I shouldn't think so.

Why not?

A. . Why, the expense. You would have to shut down. You cannot put a new wire in unless you use a double pole line.

Witness testifies on cross-examination (pages 177-178) as to his experience with handling from 2300 to 6000 volts on bare copper, and says (page 181):

Q. Have you seen any lines of the Portland Railway, Light & Power Company in the City of Portland that were not insulated, that carried 2300 volts?

A. Right outside of Portland here, from Portland to Cascade Locks it goes.

Q. I am speaking of the lines, Mr. Harbert, that carry 2300 volts in the corporate limits of the City of Portland.

A. I cannot swear that I have, inside the city limits.

Thereupon (on pages 182 and 183) in a colloquy between the Court and Counsel, the Court ruled that the City of Portland should be excluded in considering this matter, because it was stated to be under ordinance.

On page 182, the witness testifies:

COURT: I understand you to say that you have seen no lines inside of the city that were not insulated.

A. Well, outside, I saw that were insulated the transmission lines.

COURT: I understand that outside they are not insulated. Inside they are insulated.

A. Yes, that is correct.

COURT: That is what I understood you to say.

A. Yes.

COURT: I think that is enough.

On pages 183, 184 and 185 the witness testifies further and reiterates that the outside cross country lines carrying 2300 volts, are uninsulated.

On pages 198 to 201, pictures are identified of this identical line, and on page 200, witness says:

Q. Now Defendant's Exhibit "E," which one is that?

A. Well, that is myself up on the 6600 volt line. That is before I took that cross-arm off.

Q. On the same pole?

A. The same pole.

Witness Myers (electrician), pages 203-204):

Q. Did you work where the lines were bare, carrying 2300 volts?

A. Yes, sir, I have put on some insulators between Chehalis and Centralia. They had 2300 volts on their line there before they changed it.

Q. Did they use their wires bare, transmission wires?

A. They did at that time.

Q. Do you know what weather insulation is?

A. I do.

Q. Will you state to the jury what it is for and what it is?

A. Well, it is to afford a certain protection, usually against swinging short, or anything like that; but an electrical man doesn't consider it a safe protection for life or limb, as I don't think there is any manufacturer of weather proof wire will guarantee the wire up to any standard voltage.

Q. You say there is no one that will do it?

A. No, I don't think any of them will do it. In fact, they have no test tag on those wires.

Q. (pg. 204) You say the men do not consider it is safe, that is, the weather insulation?

A. Not practical lineman, no.

Q. What about the comparison as to which they think is better to work with, bare wire or wire that has got this stuff on it?

A. Well, I couldn't say about usual linemen, but I myself prefer to work with the bare wire.

Q. Why?

A. Because I am not deceived on insulation.

Q. How will the weather insulation deceive a lineman?

A. It is in various ways. Some times the deterioration of the insulation qualities of the insulation, and then there may be punctures in it, especially where you have it tied around the pin.

Q. Now, is it practicable for any company to keep their outside transmission cross country high volt-

age wires, say 2300—that seems to be the magic number in this case,—2300 volts, or 6000 volts, or 1000 volts, is it practicable for them to keep those transmission wires insulated with weather insulation so that it will protect against shock?

A. Well, on, after it has been up six months or a year, after the elements has worked on the line.

Q. It would break up any company to try to keep that stuff new, wouldn't it?

A. Yes, to keep it new, it would.

Q. (pg. 211) What is the highest voltage you handle without rubber gloves?

A. 10,000.

Q. So you know it can be done and is done right along?

A. Between 10,000 and 11,000. When I worked for the Portland General Electrical Company that was our high line coming in.

Q. You call 2300 volts high wire, or not?

A. In my estimation, I would call it very safe.

Q. Although 2300 volts will produce instant death?

A. Just as quick as 10,000 or 20,000.

(Page 211, Witness shown plaintiff's exhibit. 2)

Q. Now, you speak of weather insulation. I will show you this piece of insulated wire which is marked "Plaintiff's Exhibit 2" which they claim is weather insulated.

A. It looks like a piece of triple braid weather-proof wire.

Q. Now I will also show you this wire which I now have, that we will ask to have introduced. Will you tell what kind of insulation is on that?

A. That is what we call single braid rubber covered wire.

Q. What is the difference between single braid rubber covered wire and triple weather proof?

The witness then shows that the single braid rubber covered wire is much more safe than weather insulated, and says

Q. (212) Is there any such rubber protection on the weather insulation?

A. No, there is not; not what we call weather proof wire.

Witness then says that the smaller wire is used in residences, etc.

Q. (pg. 213) Will weather insulation protect against the electricity leaking through, or shocking or burning in wood, if it was in contact?

A. Well, it all depends on whether it was in a wet place or a perfectly dry place. More danger in a damp place than it is in a perfectly dry place.

Q. What is the voltage of the little wire that you have in your hand?

A. That small rubber-covered wire is tested and guaranteed to withstand 600 volts.

Q. You say there is no manufacturer that will test or guarantee their weather insulation?

A. Weather proof wire, no.

Q. Now, you have seen a number of cross country wires, haven't you, Mr. Myers?

A. I have, yes.

Q. Carrying 2300 volts or more. Do you know whether they are frequently left without any covering at all—just bare wire?

A. Well, there are a few—now, there is some lines up in Washington and Oregon, corporation's lines, running between Chehalis and Centralia, was 2300 volt line, bare line. But at the present date they have stepped it up to 22,000 volts.

Q. Do they insulate that?

A. No, that is bare.

Q. That is more dangerous than 2300 isn't it?

A. Yes, well, the reason why they use bare wire on high tension is the simple reason that there is no insulation that will withstand.

On page 216, Witness testifies that 2300 volt wires in the City of Portland are insulated under ordinance.

Q. They use that for the purpose of guarding the public in case a line falls on the street, or should strike another line? That is one object of the insulation, isn't it?

A. Yes, sir.

Q. It is more expensive, isn't it Mr. Myers?

A. It is a little more expensive. That is one of the objects.

Q. And you consider it safer, do you not, if it is insulated?

A. No, I do not.

Page 217, Witness tells of the reason of the extra cost, because in buying insulated wire, you have to pay the same for the insulation that you do for the wire.

Q. (Page 218) Well, you know that transmission on lines carrying 2300 volts in the City of Portland are insulated, don't you?

A. Yes, because there is a city ordinance to that effect, to insulate them.

On page 221, Witness names Wm. Castleman as a lineman working for the P. R. L. & P. Co., of Portland, who works with his bare hands on 2300 volt wire.

Q. (Page 222) But that is weather insulation like the one you hold in your hand.

A. I won't say it was like this. It may have been double weather proof.

Q. You never saw him working without gloves on naked wire, did you, uninsulated wire?

A. Only on occasions when he would make a connection, that is, practically.

Q. Well, I mean on an uninsulated copper transmission wire.

A. It would be impossible for him in the City of Portland to do it.

Q. I say, did you ever see him working on an uninsulated transmission line carrying as high as 2300 volts?

A. No.

Frank A. Hull (Defendants Expert.)

Q. (page 225) Now, you know what weather insulation is, don't you?

A. Yes.

Q. Isn't it a fact that if you have one of these cross country high voltage wires and you have to tie the wire into these insulators in the pegs, that you have to cut the insulation for the wire to make the tie?

A. Well, you don't have to cut it off, but in making the tie you surely destroy the worth of the insulation anyway—tie it tight enough to stay.

Q. That would expose the workman right there then, anyway, wouldn't it, the very nature of the work he is doing?

A. Oh, yes, he is exposed all the time.

Q. Makes the wire just the same as if it was not insulated, wouldn't it?

A. Yes, just the same.

Q. Have you ever worked with bare wires on these transmission lines?

A. Yes, sir.

Q. What is the highest voltage which you have handled on bare wires?

A. The highest voltage that I have ever handled has been 2800—2500.

Q. (page 224) How high a voltage was carried over the wires at the places where you worked?

A. We carried regular 2300 there. That is, that type of line carried 2300.

\* \* \*

Q. Have you noticed whether these cross country high voltage wires—we will speak of 2300 volts as high voltage—whether those cross country high voltage wires, have you noticed whether they are insulated or not?

A. Some of them are insulated, and some of them are not.

And in answer to the question of where he has worked, witness says:—

A. Chehalis, Kelso.

Q. (page 232) Will you tell us, Mr. Hull, where there are some transmission lines that you know of, carrying a voltage of 2300 where they use the bare wires across the country?

A. There is one at Kelso. There was one on the Kalama River that carried 6600. That was all bare wire. I believe it is yet. I know that it is—that is all bare wire. It carried 6600. There is one in Chehalis, between Chehalis and Centralia.

Q. You constructed a line in Alaska, I believe?

A. Yes, I constructed a plant in Alaska.

On page 233, the witness states that the Chehalis and Castle Rock Line carried 22000 volts, but that there was a 2300 temporary cut in on the line, which he had done work on. He says that the transmission line on this line was 2300 volts, (234) and says

Q. Now is it necessary to destroy the insulation in tying an insulator on a wire that carries 2300 volts like this?

A. Is it necessary to destroy it?

Q. Yes.

A. No it is not necessary.

Q. Is it necessary to destroy the insulation?

A. It is not necessary, but nine linemen out of ten will do it.

Q. Nine linemen out of ten will do it?

A. Certainly.

Q. (page 235) It would not be necessary to destroy it in order to fasten it substantially on an insulator?

A. Well, it might with No. 10 wire. You might have to cinch it up tight to hold. It would eat into the insulation. You cannot twist a wire around another and twist it up tight to hold anything without destroying the insulation more or less.

Q. (page 236) About how long is the life of the insulation of that kind?

A. That is all according to the climate.

Q. In a dry climate, how would it be?

A. In a dry climate, if it was put up in the summer time, it would last quite a while.

Q. Last a year or two?

A. No, no. It would never last a year in the summer, not a whole year in this country.

Q. In a dry climate, I mean.

A. I don't think it would in a dry climate.

Q. (pages 236-237) What do the Company do when they find the insulation is no good?

A. They don't do anything. They couldn't tear the lines down and built it up again.

Q. They couldn't?

A. Well, they could if they made a business of spending their money doing it.

Q. (page 238) Taking a system as described here carrying 2300 volts, Mr. Hull, you don't mean to say that if the wires had been insulated and the insulation had been in good repair and condition, would the accident then have happened?

A. Well, I cannot say. I don't know how long the wire was there. If the insulation had been perfect, of course, the accident would not have happened.

ReDirect Examination, (page 238).

Q. Is it practicable to maintain one of those cross country voltage wires like this, with perfect insulation?

A. No, sir.

Q. Or with perfect weather insulation?

A. No, sir.

Q. There is not a plant in the United States of which you have any knowledge that does that, is there?

A. No, sir.

Q. It would break them up, wouldn't it?

A. Yes, sir.

Q. Have to change their wires so often, wouldn't they?

A. Yes, sir.

On page 239, telling of the effect, which tying this insulated wire has, the witness says,

Q. And no doubt that would destroy the efficiency of the insulation, wouldn't it?

A. To a certain extent, yes.

Q. So that the work they were doing would of itself have destroyed the efficiency of the insulation to a large per cent?

A. Yes, sir.

Witness C. F. Buxton (Defendant's electrician)  
(page 261)

Q. From your experience as a lineman, will you state—these wires were uncovered over there, weren't they, uninsulated?

A. Yes, sir.

Q. No weather insulation?

A. No weather insulation. All the insulation there was, was the glass on the pin.

Q. That is the insulator to keep them off the wood? Is that it?

A. Yes that is it.

Q. To keep them from growling in damp weather?

A. Yes, sir.

Q. Will you state to the jury whether that bare wire is a safe way of handling the current through it, or whether it should have weather insulation? Which do you regard the safer, and why?

A. I regard the bare the safest of the two, because a man knows what he has got. He is not going to take a chance on some insulation on that he don't know whether it is impoverished through weather, or through making a tie upon it, being cut, or anything of that kind. He is not taking any chances on that.

Q. What you call weather insulation is not insulation against a shock then, is it?

A. Why, not at all. A man don't consider it, when he is working on a line carrying 2300 volts, insulation for protection.

Q. (page 262) Then, that weather insulation is not a protection against shock at all?

A. It is not considered a protection, and I wouldn't take it as a protection.

On pages 262 and 263 Witness names places in the Big Bend Country around Spokane and Coeur d'Alenes where the 2300 volt cross country transmission lines are all bare, and says

Q. (page 263) Now, isn't it true that in those countries, the greater part of the cross country lines that carry 2300 volts are bare?

A. Yes, sir, the greater part of them are bare.

On page 267, the witness states that 6600 volt wire is considered more dangerous than 2300, and says:

Q. What is the highest—what is the hottest wire you have ever handled, bare handed?

A. 6000.

Q. (pg. 274-275) You regard it as a safe method of work for a man to work lifting this 2300 volt wire back and forth, if he doesn't touch any other wire?

A. It is positively safe under the conditions of the weather and general conditions at this time.

On Cross Examination (page 277) the witness is shown Plaintiff's Exhibit, and says:

Q. What size is that copper wire?

A. I would say No. 4, looking at it from my general observation, I would say it was size No. 4.

Q. (278) Now, it is more expensive than the naked wire, isn't it, Mr. Buxton?

A. More expensive per foot, yes sir.

Q. (pg. 279) Now what is the object of insulation?

A. A matter of protection.

Q. A matter of protection?

A. Yes, sir.

\* \* \* \* \*

Q. Now, if the plaintiff, Johnnie Bisher, would have come in contact with a wire properly insulated as this is insulated here, would there have been any accident?

A. As that is insulated there, there wouldn't have been any accident.

Q. If it had been defective, or if it had been broken, or old and worn, or rotten and decayed, it would have been dangerous almost as much as if it was naked wire, wouldn't it?

A. It would have been more so, because they would probably have taken a chance where being naked they wouldn't.

Q. (page 280) Now isn't there another object of insulation, that if a wire is insulated, if it comes in contact with another wire in case of a storm, or if the tie wire should break and it should drop down on the pole, if it is insulated, there is no danger, is there?

A. Yes, there is.

Q. What danger would there be if the insulation is good insulation? I am speaking of not defective insulation, but I am speaking of insulation.

A. (pg. 281) Well, we will understand as good insulation as that there insulation as it stands right now is good insulation for weather proof?

Q. Yes.

A. But in case that is should be wet and drop down onto that cross-arm—

Q. And the cross-arm was wet?

A. And the cross-arm was wet, with 2300 volts, there would be danger of a ground.

Q. There would be danger of a ground.

A. Yes, sir.

On ReDirect Examination, (page 287) The witness says:

Q. How long would weather insulation last in a perfect condition?

A. A short time.

Q. (page 288) The first rain does it up, doesn't it, for that purpose?

A. A man doesn't want to take any chances on it after it has been out there, after the first rain, we will say.

Q. Now, would it be practicable for any electric light company, operating a cross country transmission line, to keep its wires perfectly insulated with weather insulation? Is it possible for them?

A. It is not possible, and there is no way—there is no law or anything of the kind that could make them keep it in first-class insulation.

Q. Bankrupt any company to do it, wouldn't it?

A. They would never start at all. Yes, it would break any company.

The above evidence that it is impossible to keep transmission cross country 2300 volt wires insulated as against shock, is uncontradicted.

The evidence to the effect that the insulation would be broken by tying the wire over the porcelain knobs on the pegs, is uncontradicted.

The evidence that when the insulation is once broken, its efficiency is gone, is uncontradicted.

The evidence that it would bankrupt any company to attempt to keep its cross country transmission lines insulated with weather proofing so as to protect against shock, is uncontradicted.

This testimony, covered by the instruction which the Court gave to the jury, as heretofore quoted, clearly demonstrates that the verdict of the jury is against the instructions of the Court and is not supported by the evidence.

## **SUFFICIENCY OF EVIDENCE.**

### **POINTS AND AUTHORITIES.**

And we take it, the error in over-ruling the motion for non-suit, as well as for directed verdict, as well as for new trial, on ground of insufficiency of evidence, is always a question of law.

We further insist that the evidence in this case fails to make out a cause of action in favor of the plaintiff, for the following reasons,

First, the evidence fails to show:

- A That the proximate cause of the injury was the negligence of the plaintiff.
- B What was the cause of the injury.
- C That plaintiff's negligence was not the approximate cause.
- D That he was discharging any duty that required him to touch two wires at the same time.

The evidence does conclusively show:

- A That the plaintiff could not have received a shock without touching two wires at the same time.
- B That he did touch two wires at the same time.
- C That no duty required him to do this.
- D That in touching the two wires at the same time he did so carelessly and negligently.
- E That his injuries were a result of his own carelessness and negligent act.
- F That he was a volunteer, in so working as to touch two wires at the same time.
- G That the duties for which he was employed were to work down on the ground, and did not require him to mount poles for the purpose of working among the live wires.
- H That in working on the ground he did not require any protecting instrumentalities.
- I That he did not require any rubber gloves,

or insulated pliers, or sow-belly, or climbers, or ladders, or any other instrumentalities.

J That Harbert was not a foreman, nor in charge of the work.

The evidence conclusively shows that he was hired principally for the reason that he already knew how to climb wires and poles; that he was experienced in climbing, and that he was given climbers and a belt, so that he could help Harry Harbert, if Harry Harbert got in trouble.

The pliers were given to him, so that he could cut the tie wires in proper lengths on the ground.

The lineman was furnished with a sack and a rope, by means of which he could haul up the tie wires and the insulators from the ground without asking Johnnie Bisher to do any work on the poles.

It is further conclusively shown by evidence that is not denied, that Johnnie Bisher had worked there before, and knew of the dangers and had been cautioned on numerous occasions the year before, as well as at the time he was here.

On page 274, Witness Buxton says:

Q. Had he worked there before?

A. Not on the line; but the year before I made some taps up in the mill, and Johnnie helped me, out of this 2300. And we worked between this 2300 and some light wires, on a scaffold, the light wires was right behind us carrying 110, and I cautioned him to be very cautious and guard them too, as if he should touch one of them and me, it would be no bet-

ter than touching the two at 2300, and I cautioned him very cautiously for to not touch me while I was busy there.

### **INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN ANY ALLEGATION OF THE COMPLAINT.**

From the summary of the evidence quoted, we respectfully submit that none of the charges of negligence set forth in the complaint are sustained. We discuss them seriatem:

(Page 3, Allegation 4. Charge 1.) That the defendant unlawfully and negligently constructed and maintained its transmission wires of dangerous voltage, by failing to insulate the same at the poles and arms on which they were rested, and where the employees of the defendant were liable to come in contact therewith.

The evidence shows:

- A That this line was of the three-phase system.
- B The cross-arms were of standard size.
- C No defect is complained of in the poles.
- D Bare wires are safer than insulated wires.
- E Insulated wires are impracticable and extremely expensive.
- F They would bankrupt any company to maintain them in condition to resist shock.

**Charge of negligence No. 2,** (Page 3, Allegation 4,) It is charged that the defendant unlawfully and

negligently strung said dangerous voltage wires at an insufficient distance from the poles and supports to permit repairers to freely engage in work.

The evidence shows the direct contrary to be true, and shows:

- A That there was a 30 inch space provided for by the arrangement of the three-phase system of the cross-arm.
- B That 30 inches is ample for any man to work in.
- C That the cross-arm was of standard size.
- D That it was properly attached to the pole.
- E No complaint is made that it was rotten or damp or insufficient in any way.
- F The method and manner of lifting the wire over the pole so as to provide a 30 inch space, is common, customary and usual.

**Charge of negligence number 3,** (Page 3, Allegation 4,) That the defendant, "constructed, maintained and mingled dead wires on the same supports with live wires.

The only dead wires shown in the case, was the telephone wire which was seven feet below.

The testimony shows that 210,000 volts are required to arc one foot. That no arc greater than one foot has ever been known in electrical work, and the charge that this dead wire, seven feet distant, was mingled with live wires, is absolutely false and untrue.

**Charge of negligence number 4,** (Page 3, Allegation 4) It is said that the defendant, "Failed to designate the arms or supports bearing said live wires by a color, or other designation."

The object of this color, or designation, would be to charge an employee with notice, but in this case, it is admitted that Johnnie Bisher was working as a grunt, and that live wires were 25 feet above the ground.

He also admits that he knew at all times that he worked there and had positive knowledge even before he worked there, that these wires were dangerous; they they were live; that they carried 2300 volts; that he had been cautioned time and again that if he touched two of them, or "shorted" one, as he calls it, it meant instant death.

Besides, the record clearly shows that he was cautioned by Mr. Buxton time and again, on the year before, to-wit in 1911, (see page 274) of the danger of touching live wires, and Harry Harbert says, and his testimony is not denied, that he cautioned Johnnie Bisher on the day that he was hurt, and Harbert thinks on the identical pole, and this is not denied.

With all this notice and knowledge that these transmission wires were live, and with no charge in the complaint that the injury was caused by failure to paint the cross-arms, or by any color scheme, how can this be alleged as an approximate cause of the injury?

**Charge of negligence number 5** (Page 3, Allega-

tion 4.) It is further claimed that the defendant "Failed to use any device, care or precaution, to protect the safety of life and limb of the employees of the defendant in the use or repair of said dangerous voltage wires."

It is further asserted that the defendant did not furnish sufficient instrumentalities; and it is claimed that he should have furnished,

- A Rubber Gloves
- B Insulated Pliers
- C Strong Belt
- D Body Protector (Sow belly)
- E Ladders
- F Climbers

Johnnie Bisher admits that he was not hurt by reason of the pliers, nor by reason of the climbers, nor by reason of the belt. There is no evidence to show that ladders are used, and the only instrumentalities he claims the defendant should have furnished, that might in any probability figure into the cause, are

### **Rubber Gloves and Body Protectors**

It is admitted by Bisher, and by his expert, and shown by the witnesses that the body protector could not possibly have been used in the work which he alleges he was doing at the time he was injured.

The two outer wires had been fixed; the one inner wire was being adjusted, and the body protector is only used when it is necessary to lean over one wire in order to adjust another close to it, and when working in close quarters.

Then this brings us to the rubber gloves. The testimony concerning this has been discussed. The employer did not know that Johnnie Bisher was on the pole, or that he intended to work among the wires, and he was doing no work which required any protecting instrumentalities.

On the other hand, the duties of Johnnie Bisher are admitted and shown to have been working on the ground, out of danger, and it is conceded by everyone, that the discharge of the duties for which he was employed, did not require gloves or any other protecting instrumentalities.

In addition, Johnnie Bisher does not say that he was hurt by reason of not having rubber gloves or other instrumentalities. He says that he does not know how he was hurt, and certain it is, that no duty of his, or of any electrician, requires him to touch two live wires at the same time.

**Charge of negligence number 6,** (Page 4, Allegation 7) It is charged that Johnnie Bisher was ignorant of the use of electricity and inexperienced, etc., and argued that the defendants, with knowledge thereof, directed him to assist in placing insulators and negligently and carelessly failed to turn off the electric current on said live wires. These charges cover **Allegation 4, page 7,** and part of **Allegation 5, page 8,** and **Specifications numbered 6, 7 and 10.**

There is nothing to sustain this, whatsoever. Johnnie Bisher was not ignorant, he knew. The employer did not order him among the wires, he went there of his own volition. No one requested, directed

or told him to touch two wires at the same time—he was specifically cautioned time and time again, not to do so.

He knew that the current was on. He knew that men worked at adjusting insulators when the current was on, and that such was the ordinary way of doing the work. His charges in these particulars are totally unsustained.

**Charge of negligence 8,** (Allegation 5, page 8) It is further charged that the defendant negligently and carelessly required the plaintiff, under the direction of their foreman, to climb a pole, using climbers, and without ladders or other apparatus to sustain his weight.

No lineman ever carries a ladder. Ladders are not furnished under any circumstances. There is no evidence to sustain the presumption that they are. Bisher had climbers of his own selection. He admits that they were sharp, and that he was not hurt by reason of his climbers, and this charge, therefore, fails.

**Charge of negligence 9,** (Allegation 5, Page 8.) It is charged that the defendant “Required him to lift one of the wires, etc.” He was not hurt by reason of lifting one wire. He was hurt because he carelessly, negligently and recklessly got tangled in two wires.

The evidence is ample to show that one 2300 volt wire will not hurt anybody, under the dry conditions that prevailed in that country in July 1912, and that it is perfectly safe to work with one 2300 volt wire without rubber gloves, by lifting it from pole to pole.

In fact, if Johnnie Bisher's evidence is to be believed, he had done this numbers of times before in safety, as he claims he and Harbert worked there before, and Harbert certainly did the work thereafter in safety in the same manner, as he completed the entire line alone without injury, and when the line was constructed it was done without injury. The record shows that this injury to Johnnie Bisher is the only one that ever happened at this plant.

**Charge of negligence 11,** (Allegation 8, Page 5) It is charged that the defendant negligently and carelessly failed to provide any means to protect plaintiff from being injured by the live wires.

The evidence on this point has been thoroughly gone into. Johnnie Bisher does not claim he was injured by reason of the absence of any instrumentalities. He does not show that all of the instrumentalities herein set forth, would have kept him from putting his arms against both the wires in the manner which he did, nor does any witness swear that with rubber gloves and weather insulated wire he could have touched two 2300 volt wire with safety.

Nor does he show that any duty, even as a line-man, or in any capacity, required him to get in contact with two live wires at the same time.

Nor does he swear that he would have used rubber gloves, had they been provided.

**Charge of negligence 12,** (Page 5, Allegation 9, It is stated that the defendant, Johnnie Bisher, held the live wire in his hand while the foreman was endeavoring to

oring to place an insulator on the line carrying the same.

There is no duty that requires this. He should have lifted the wire over the pole. Certainly Harbert did not ask him to hold the wire in his hand while Harbert adjusted the insulator.

If Bisher's testimony as to what work he did is true, he knew he was not required to stand on that pole and hold the wire in his hand. He knew that the wire should be lifted over the pole, thus creating the 30 inch space referred to, and it was a physical impossibility for him to receive a shock from this one wire while he was standing on a dry pole in July, 1913. The laws of physics, the testimony of the witnesses, the history of electrical shock, is that it always requires a double contact, and hence the one wire is insufficient.

**Charge of negligence 13, (Page 5, Allegation 9)** It is said that while he was holding this live wire, without any negligence on his part **and without knowing it was dangerous so to do**, plaintiff received an electric shock, but what caused him to receive a shock, the plaintiff does not state. He knew that he could not have received it from one wire. The laws of nature refute his claim that he could, and he cannot account for the double contact he received, as no duty required him to make it.

It is, therefore, apparent that he was hurt through his own negligence, and that none of the charges of his complaint are sustained.

We respectfully submit that the evidence is totally insufficient to show any liability of the defendant to the plaintiff for his injuries, and where there is no evidence, to show the negligence of the master as the proximate cause, the error of the Court in not directing the verdict is plain.

Patton vs. Texas & Pac. Ry. Co. 179 vs. 658;  
Bk 45 L. 361.

If our analysis of this evidence is correct, then it is plain that the Court erred in over-ruling our motion for non suit; in over-ruling the notion for a directed verdict; and in refusing to give instructions,

Number 1 (page 384)

Number 2 (page 384)

Number 3 (page 385)

Number 4 (page 385)

Number 6 (page 386)

Number 7 (page 386)

Number 9 (page 387)

Number 10 (page 387)

Number 11 (page 388)

Number 12 (page 388)

Number 13, in manner and form requested by the defendant and also erred in submitting the case to the jury in any manner whatsoever. For all of these reasons, we submit that the case should be reversed and the error dismissed.

In conclusion, we respectfully apologize for the length of this brief, but the importance to the elec-

trical industry of the State of Oregon, as well as to the appellant, has compelled us, we feel, to be explicit in our statements in support of the charges of error; with the feeling that we are aiding rather than retarding the Court in its investigation.

Respectfully submitted,

EMMETT CALLAHAN,  
SMITH & LITTLEFIELD,  
Attorneys for Plaintiff in Error.

3

IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT.

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**ROBERT M. BETTS**, Receiver of The Cornucopia  
Mines Company of Oregon, a Corporation,  
Plaintiff in Error.

vs.

**JOHN L. BISHER, Jr.**, by **JOHN L. BISHER**, his  
Guardian ad Litem,  
Defendant in Error.

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**Brief of Defendant in Error.**

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Upon Writ of Error From the District Court of the  
United States for the District of Oregon.

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**STATEMENT OF THE CASE.**

I.

On the 5th day of December, 1911, a suit in equity was commenced in the District Court of the United States for the District of Oregon, in which Hamilton Trust Company was complainant and The Cornucopia Mines Company of Oregon, et al, were respondents, in which the Court had and acquired jurisdiction of the parties and the subject-matter of the suit.

## II.

In said suit, and on the 7th day of December, 1911, Hamilton Trust Company filed a motion, based upon the bill of complaint and the affidavit of Emmett Callahan, then attorney for The Cornucopia Mines Company of Oregon, asking for the appointment of a receiver, and based upon such application, the Court made an order appointing Robert M. Betts receiver of The Cornucopia Mines Company of Oregon; and on the 2nd day of January, 1912, the said Robert M. Betts filed his bond and qualified as such receiver and entered upon the discharge of his duties.

## III.

It appears from the affidavit of the said Emmett Callahan:

“That it is necessary that said mines should continue in operation and development; that if said mines were closed down and ceased to be operated and developed, great, irreparable injury and loss would occur by said mines being closed down and not operated; that if said mines are not continued in operation and development, the stamp mill, electric power plant, engines, pumps and other machinery will greatly deteriorate in value and loss; that the tunnels, shafts, winzes, stopes and other underground openings and workings of said Cornucopia Mining Claims and mines would cave in and be greatly damaged, and great loss follow by the action of the elements and the flooding of said openings in said mine and mining claims filling up with water, deteriorating, destroying and damaging said mines and mining claims, its buildings and operating plants in a reasonably

estimated sum of at least from forty to one hundred thousand dollars."

#### IV.

In the order appointing said Robert M. Betts receiver, the Court authorized and directed him to take immediate possession of all and singular the said real and personal property and to continue the operation of the said mining property and every part and portion thereof as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so, and that all persons should turn over and deliver to said receiver any and all of said property into his hands and into his control, and further that out of the moneys "Which come into the hands of said receiver from the operation of the said property or otherwise, he should pay the necessary expenses incident to the operation of the said property and hold the remainder, if any, there be, subject to the order of the Court herein, etc."

#### V.

On the 30th day of April, 1912, a decree of foreclosure was duly entered in the suit, and it was provided in such decree that the proceeds of such sale should be applied as follows:

##### **First.**

To the expenses of the sale of said property.

**Second.**

To the expenses of the receivership herein.

**Third.**

To the costs of this suit.

**Fourth.**

Complainant's attorney's fees.

**Fifth.**

Taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.

**Sixth.**

The balance to the bond holders.

**Seventh.**

Any amount remaining, to The Cornucopia Mines Company of Oregon.

And it was therein further provided "At the time of the execution of said deed, said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said company; that upon the execution and delivery of the conveyance as aforesaid, the purchaser shall be let into possession of all of the said property."

**VI.**

The decree further provides "That any purchaser of the property at such sale shall be entitled to use and apply, in making payment of the purchase price, any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of

the purchase price should be paid in cash to provide funds for the payment of all costs and expenses incurred, etc.”

## VII.

On the 29th day of June, 1912, the property was sold under the decree to C. E. S. Wood, as trustee for the bond holders under the trust deed or mortgage, and on the 6th day of August, 1912, the Court made an order confirming the sale. On the 30th day of August, 1912, Robert M. Betts, as receiver, prepared and filed his report as such and asked to be discharged. Such report has never been approved and he has never been discharged as such receiver.

## VIII.

On the 29th day of July, 1912, the said John L. Bisher, Jr., while employed on the property, sustained serious personal injuries.

Based upon a good and sufficient showing therefor, the judge before whom the case was tried made an order appointing John L. Bisher guardian ad litem of the said John L. Bisher, Jr., and authorizing the guardian ad litem to commence and prosecute this action.

On the 12th day of October, 1912, John L. Bisher, as guardian ad litem of John L. Bisher, Jr., commenced this action in the United States District Court of Oregon against Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, et al, to recover for the personal injuries alleged to

have been sustained by the said John L. Bisher, Jr.

The complaint appears in the transcript of the record on pages 1 et sequor.

The answer of Robert M. Betts, receiver, appears on pages 7 et sequor of the transcript.

Plaintiff's reply appears on page 17 et sequor of the transcript.

## IX.

The action is founded upon the negligence of the said receiver in the maintenance, construction and operation of an electric power transmission line leading from the power house of The Cornucopia Mines Company of Oregon to the quartz mill of and on the property of The Cornucopia Mines Company of Oregon. It is alleged John L. Bisher, Jr., was in the employ of said receiver and engaged in the construction and repair of such electric power transmission line, and by reason of the faulty construction of the line, and failure to provide a safe place to work, and the neglect to use any device, care or precaution to protect him, and without his fault or neglect, and through the negligence of the receiver, John L. Bisher, Jr., came in contact with electric wires which were charged with a high voltage, and by reason thereof sustained the injuries of which he complains.

All of such matters are denied by the answer of Robert M. Betts, receiver, in which he pleads an affirmative defense, among other things to the effect that, at the time of the accident, John L. Bisher, Jr.,

was not in the employ of the said receiver, but that he was in the employ of the said Robert M. Betts as lessee of the property, and lessee only, and that any injuries which John L. Bisher, Jr., sustained were the result of his own negligence and carelessness, and of risks which he assumed.

A reply was filed denying any and all of the material allegations of the affirmative defense of the answer.

## X.

A trial was had before a jury in the said Court on the 11th day of April, 1913, and the jury returned a verdict in favor of the said John L. Bisher, as guardian ad litem, and against the said Robert M. Betts, as receiver, for the sum of Twelve Thousand and Five Hundred Dollars (\$12,500), and based upon such verdict a judgment was entered, from which this appeal is prosecuted.

The cause was tried by the plaintiff upon the theory that at the time he sustained his injuries John L. Bisher, Jr., was in the employ of Robert M. Betts as receiver of The Cornucopia Mines Company of Oregon, and that at such time the receiver was in charge, and engaged in the operation of the property under the order of the Court by which he was appointed, and that John L. Bisher, Jr., sustained his injuries as a result of the negligence of the receiver in such operation.

The cause was defended by the receiver upon the theory that John L. Bisher, Jr., was not in the em-

ploy of Robert M. Betts as receiver, and that Robert M. Betts as receiver was not in charge, or engaged in the operation, of the property, and that Robert M. Betts was in charge, and engaged in the operation, of the property as lessee, and that John L. Bisher, Jr., was in the employ of Robert M. Betts as lessee, and not as receiver, and that any injuries which he sustained resulted from his own carelessness and negligence.

### **CORRECTION OF PLAINTIFF IN ERROR'S STATEMENT OF THE CASE.**

The plaintiff in error erroneously assumes that the trial Court did not give his requested instructions numbered 5, 6, 9 and 13, and that his requested instructions numbered 10 and 12 were not included in and made a part of the Court's charge to the jury.

### **ANSWER TO SPECIFICATION OF ERRORS.**

#### **I.**

The trial Court did not err in refusing to strike out the testimony of John L. Bisher, Jr., about the climbers, belt and pliers, as specified in the first assignment of error. Such testimony was received without objections, and the exception was on the motion to strike out after the testimony was received and such testimony was competent.

#### **II.**

The trial Court did not err in overruling the motion to strike out the testimony of Albert Smith,

specified in assignment of error No. 2. The testimony was received without objection, and the motion to strike was made after all such testimony was received, and the testimony was competent.

### III.

The trial Court did not err in permitting the witness, L. W. Sloper, to answer the question specified in the third assignment of error, and any objection to such testimony was thereafter waived and the witness qualified as an expert lineman.

### IV.

The trial Court did not err in permitting the witness Smith to answer the question specified in the fourth assignment of error, and the defendant afterwards met that issue and went into that question fully in his cross-examination and in his proof, and is estopped to rely upon that as error.

### V.

The trial Court did not err in overruling the defendant's motion for a non-suit. Such motion was based upon the ground of negligence and negligence only, and presented that question of fact, and that question only.

### VI.

The trial Court did not err in overruling the objection to the question propounded to Robert M. Betts, specified in assignment of error No. 6. Such question was asked on cross-examination, and was harmless.

## VII.

The trial Court did not err in overruling the motion for a directed verdict for the reasons stated in assignment of error No. 7. The Court had jurisdiction; and the second, third, fourth and fifth reasons specified in such motion are based upon questions of fact, and of fact only.

## VIII.

The trial Court did not err in overruling defendant's exception to the remarks of plaintiff's counsel, as specified in the eighth assignment of error. Such remarks were in the nature of an argument, and argument only, and were based on inference, and inference only.

## IX.

The trial Court did not err in refusing to give defendant's requested instructions No. 1, 2 and 3, because there was sufficient evidence to submit the case to the jury.

## X.

The trial Court did not err in refusing to give defendant's requested instruction No. 4, because that was a question of fact, and there was sufficient evidence to submit that fact to the jury.

## XI.

The trial Court did not err in refusing to give defendant's requested instruction No. 5, because it gave such instruction.

The trial Court did not err in refusing to give de-

fendant's requested instruction No. 6, because it gave such instruction.

The trial Court did not err in refusing to give defendant's requested instruction No. 8, and gave the substance of such instruction in its charge to the jury.

The Court did not err in refusing to give defendant's requested instruction No. 10, and gave the substance of such instruction in its charge to the jury.

## XII.

The trial Court did not err in refusing to give defendant's requested instruction No. 11, because it is not the law.

## XIII.

The trial Court did not err in refusing to give defendant's requested instruction No. 12, because that was a question of fact which should have been submitted to the jury.

## XIV.

The Court did not err in refusing to give defendant's requested instruction No. 13, because it gave instruction No. 13.

# POINTS AND AUTHORITIES.

## I.

His Honor, Judge Bean, appointed the defendant as receiver, and he qualified on January 2, 1912, and ever since has been, and is now, the duly appointed,

qualified and acting receiver under such appointment, and the Court had jurisdiction.

Simkin's Federal Equity Suit, 2nd Edition,  
pages 182 et sequor, and authorities cited.

## II.

The order appointing the receiver, and under which he qualified, authorized and directed him "To take immediate possession of all and singular the said real and personal property, and to continue the operation of said mining property and every part and portion thereof as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so."

## III.

The motion for a non-suit was based upon negligence and negligence only, and it cannot be urged on other or different grounds on this appeal. This is elementary.

Ferguson vs. Ingle, 38 Oregon, page 44.

## IV.

It is a question of fact as to whether or not John L. Bisher, Jr. was in the employ of Robert M. Betts as receiver, or Robert M. Betts as lessee, and that fact was submitted to the jury under fair and impartial instructions.

## V.

The action is founded upon Oregon's Employers'

Liability Act, and the instructions follow the provisions of that act.

1911 Session Laws of Oregon, page 16;

Lord's Oregon Laws, Volume II, page  
XXXVI.

#### VI.

All questions of fact were fairly submitted to the jury, and the findings of the jury are conclusive.

#### VII.

Having met the issues of fact which may have been made by the introduction of incompetent testimony, plaintiff in error cannot complain at the introduction of any such testimony.

#### VIII.

The instructions were full and complete, and fairly presented the case to the jury.

#### IX.

There was ample testimony in the record to sustain the finding that John L. Bisher, Jr. was in the employ of the defendant as receiver.

#### X.

The plaintiff in error having failed to point out or specify, as a basis for his motion of non-suit, that there was no evidence tending to show that John L. Bisher, Jr. was in the employ of Robert M. Betts as receiver, and thereafter offering evidence to show such fact, waived the right to raise that question.

Ferguson vs. Ingle, Supra.

**ARGUMENT.****I.**

There is nothing in the question of jurisdiction. Hamilton Trust Company commenced a suit in the U. S. District Court of Oregon against The Cornucopia Mines Company of Oregon, et al, to foreclose a trust deed or mortgage upon certain mining and real property lying and being situate in the County of Baker and State of Oregon, and in that suit, and based upon the affidavit of Emmett Callahan, who was attorney for The Cornucopia Mines Company of Oregon, an application was made to the court for the appointment of a receiver. Pursuant to such application, the court, in that suit, made an order appointing Robert M. Betts as receiver, and at the time of such appointment, the court, in that suit, had jurisdiction of the parties and of the subject-matter, and this case was brought in the identical court in which Betts was appointed as receiver; and under all the authorities based upon the statute then existing, the court would have jurisdiction of this case without regard to the question of citizenship.

The complaint is based upon an act of and a transaction with the receiver, arising from and growing out of his possession and operation of the mine under the order of the court which appointed him. It appears from the record that Robert M. Betts was appointed receiver by the U. S. Court at Portland, Oregon, with authority and direction to take charge of and operate the property of the Cornucopia Mines

Company of Oregon, and that under such order and authority he took possession of the property and was engaged in its operation, as such receiver, at the time of the injury. The court had jurisdiction of the defendant and the subject-matter of the suit, and through its receiver was in the actual possession of the property; and it appears from the record and is found to be a fact by the jury, that, at the time of the accident, John L. Bisher, Jr. was in the employ of Robert M. Betts, as receiver, and this action, by and with the consent and approval of the court, was brought and tried in the identical court in which the receiver was appointed, and such facts bring it squarely within the law as found in Simkin's *A Federal Equity Suit*, 2nd. Edition, page 182. None of the authorities cited by counsel are in point in this case. The decisions are either founded upon a different state of facts, or under the old statute.

## II.

The order appointing the receiver authorized and directed him to take possession of all the real and personal property and to continue the operation of the whole and every part thereof as it was formerly operated, and to preserve and keep the property in good condition and repair, and to employ such persons as might be necessary for that purpose. Hence, we have a receiver appointed by the court in which the action was brought, with authority and direction to operate the property, and the defendant in this action is the identical person that was appointed

and qualified as such receiver, and was such receiver on the 28th of July, 1912, at the time of the accident, and is now such receiver.

### III.

At the close of plaintiff's testimony, defendant moved for a non-suit "Upon the ground that the evidence of the plaintiff and his witnesses does not show any negligence of the defendant whatsoever. It shows that the plaintiff does not know how this injury occurred, and the facts of the injury are left to inference." No other ground was assigned or specified in the motion.

The defendant having pointed out and specified the reasons upon which his motion for non-suit was based, waived any and all other grounds of such motion, and cannot for the first time, and on appeal, assign any other or different grounds for such motion. This is elementary law. In the case of *Ferguson vs. Ingle*, 38 Oregon, p. 44, and authorities cited, it is held:

"The rule is well settled that the motion of an adverse party for a nonsuit must specify the grounds therefor, and, unless it does so, an appellate court will not review the action of the trial court in denying the motion." (Citing authorities.) "The reason for this rule is found in the fact that an appellate court will consider only such questions as have been presented to the trial court at the proper time and in an appropriate manner; and when it appears that the question sought to be reviewed was not thus submitted to the Court, the presumption that its decision thereon is correct ought to prevail."

The only question presented by the motion is one of negligence of the receiver, and there is ample testimony sustaining the finding of the jury that the receiver was negligent in the operation of the property.

#### IV.

It was a question of fact as to whether or not John L. Bisher, Jr. was in the employ of Robert M. Betts as receiver or Robert M. Betts as lessee, and on that fact, after the Court clearly stated and defined the issues, it gave the following charge to the jury:

“Such being the issues, you will proceed to find, first, whether young Bisher was in the employ of Betts as receiver, or whether he was in the employ of Betts as lessee. This is made a direct issue in the case, and it is for you to determine that issue. It is admitted that Betts was appointed receiver. This is admitted by defendants themselves; and that he continued to be receiver until after this accident transpired, and is now receiver. On the other hand, they say that Betts was the lessee of these mines and was working in that capacity at the time this accident happened. The lease has been offered in evidence, and you have it before you, gentlemen of the jury. It bears date, I think, acknowledged on the the 9th day of November, 1911. It is also shown to you by the record which has been offered in evidence here, that the suit was commenced subsequent to the time this lease was executed and to the time that Betts was constituted lessee of these mines; and also that the receiver was appointed subsequent to that time, and that he took charge as receiver subsequent to that time. Now these

two positions are not inconsistent. Betts could act as the lessee of this mine and also act as the receiver of this mine without one duty being inconsistent with the other. That is to say, if appointed receiver, he would take charge of the mine as receiver, to be operated or to be conducted, or the estate to be closed up subject to the leasehold estate in the premises. Now, it is for you to determine, and I will submit that question to you as a matter of fact, whether or not Betts, at the time this accident occurred, was acting in the capacity of a receiver. If he was, then the negligence, if negligent at all, would be attributed to him. Or whether Betts was acting as lessee. If he was acting as lessee at the time this transaction occurred, or this accident happened, then he would not be responsible. And this fact you must determine from the record which has been offered in evidence here, from what was done in the record, and the returns that have been made, and what Betts reported as having done in the premises, and determine from that record whether or not Betts was acting at the time this accident happened as receiver of these mines, or whether or not he was acting in the operation of the mines as a lessee of the mines."

Under such instruction the jury found that fact in favor of the plaintiff, and there is ample evidence to sustain that finding.

In addition to this, there is ample testimony in the receiver's report, and in particular on the face of the receiver's vouchers, tending to show that in at least some of them the words "Robert M. Betts, Lessee" were placed upon such vouchers with a rubber stamp after the bills had been rendered and after the bills had been paid. The complete record

in the case of Hamilton Trust Company vs. The Cornucopia Mines Company, et al, including the report of the receiver and the vouchers of the receiver, were before the Court in the trial of this case, and portions of them were read in the arguments which were made by respective counsel during the trial of the case; and it appears on page 40 of the "Transcript of Record," as follows:

"It is agreed between counsel that the record in the suit of Hamilton Trust Company vs. The Cornucopia Mines Company (No. 3869) filed in this Court June 14, 1912, may be considered admitted, and either side may read any portion of it."

Such record is not incorporated in, or made a part of the transcript of the record in this case, and for such reason, the Court below, at our request, has made an order certifying such original record, to be used and inspected by this Court in the trial of this case. And from the testimony which was taken, and from such record, there is ample evidence to sustain the findings of the jury, in legal effect, that John L. Bisher, Jr., was in the employ of Robert M. Betts as receiver at the time of the accident.

Commencing on page 305 of the "Transcript of Record," and while Mr. Betts was on the witness stand in his own behalf, the following proceedings were had:

"Now on this 21st. day of December, 1911, comes the complainant the Hamilton Trust Company, by Williams, Wood & Linthicum, its solic-

itors, and it appearing that respondent, The Cornucopia Mines Company of Oregon, and respondent Valentine Laubenheimer have been regularly served with the order to show cause herein, and it appearing that the respondent S. W. Holmes, has very little interest herein, and that the application for a receiver herein is not resisted by any of said respondents, and the Court having been fully advised in the premises, it is now hereby ORDERED, ADJUDGED and DECREED that Robert M. Betts be, and he hereby is, appointed receiver of all and singular the real and personal property of the said The Cornucopia Mines Company of Oregon covered by the mortgage sought to be foreclosed herein, and that said receiver be, and he hereby is, authorized and directed to take immediate possession of all and singular the said real personal property wherever situated or found, and to continue the operation of said mining and other property, and every part and portion thereof, as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so. It is further ordered that said receiver, within the next ten days, file with the Clerk of this Court, a proper bond, which bond was properly executed and signed. And in connection with that is an affidavit made by Colonel Callahan that it was necessary that the Receiver operate this property,

and the Receiver was operating this property on the 28th day of July, 1912, and has made his reports to this Court. Judge Bean, your Honor, made these orders, and here is the judgment roll."

COURT: This lease was made prior to the time the Receiver was appointed?

MR. SMITH: YES. It was made the 1st day of November, 1911, and executed the 9th.

COURT: When was the receiver appointed?

A. The 21st. of December.

MR. CALLAHAN: The receiver was appointed December 21, 1911.

MR. SMITH: The lease was both executed and recorded long prior to that time, when Mr. Betts was not a party to the proceedings.

(Argument)

COURT: The receiver has reported that he has made certain expenditures, and he has also shown that he has received certain moneys from the mine, so that the expenditure would be set off against what he received. Now, then, were those expenses that he has returned as having expended on account of this mine, were those expenditures incident to keeping up this electric plant and keeping up the expenses touching the running of the plant?

MR. CALLAHAN: Yes.

MR. BETTS. We have to run the plant to run the mine.

COURT: Wouldn't that be part of the business as lessee?

MR. BETTS: Yes.

COURT: They why did you report that as an expense to the receiver, to your operation of the mine as receiver?

MR. CALLAHAN: The lease requires him to account to the Cornucopia Mines Company and pay them a royalty of ninety per cent of the proceeds.

COURT: I will admit this lease and dispose of the other question afterwards. It might be necessary to submit that question to the jury to determine whether they were operating under this lease, or under the receivership.

Page 312.

Q. I direct your attention to a report of the receiver, parts of which have been read, that was filed in this Court August 30, 1912. After that date did you still operate the mine?

A. Yes, sir.

MR. SMITH: Now, this is already in evidence, I believe. (Referring to report).

Page 324. Examination by the Court.

Q. At the time of this accident, was the power plant being operated in connection with the mine?

A. Yes, sir.

Q. Was it used for any other purpose besides the operation of the mine?

A. No, sir.

Q. Entirely for that purpose?

A. Entirely for that purpose, yes sir.

Page 325.

Q. Mr. Betts, you state in this report that you submit this report of the operation of said mines under said lease and receivership to this Court. Section 3, you stated "that during the said receivership of said Cornucopia Mines Company of Oregon, as aforesaid, he held and operated said mines under a written lease with said Cornucopia Mines Company." That he submits this, his final report of the operation of said mines under said lease and receivership to this Court, said account showing that he received \$71,681.27 as receipts from ores, bullion and concentrates in the operation of said mines of said respondent." That is true, is it, Mr. Betts?

A. Yes, sir.

Page 326.

Q. "That said account shows his total expenditures in the conduct and operation of said mines, stamp mill, etc., in the sum of \$71,681.27, less a deficit of \$781.81. That he took proper signed vouchers for each and every item set forth in the account attached hereto and made a part of this final report." Now, Mr. Betts, this says the report of the receiver of the Cornucopia Mines Company of Oregon.

A. Yes, sir.

Q. Is that the report of the receiver of the Cornucopia Mines Company of Oregon?

A. Yes, sir.

Q. It is?

A. Yes, sir.

Page 327.

Q. Why did you make any report to the Court? What did you make this report for?

A. Because I was instructed to by the Court.

Q. You were instructed to operate that plant, too, weren't you?

MR. SMITH: We object to that, if the Court please. That is wholly immaterial.

COURT: This is cross examination. I will permit him to answer.

A. As I understand the order, I was to take possession—

Q. Of the plant?

A. Of the mine and the plant; the mine and the property.

Q. You obeyed the order of the Court, did you?

A. Yes, sir.

Q. You took possession upon the order of the Court, didn't you?

A. Yes.

Q. The Court ordered you to take possession, didn't it?

A. Yes.

Q. And you took possession?

A. I was already in possession.

Q. Well, why did you make any report to the Court then?

A. Because I was instructed to. Is it all right for me to state the way I thought about it?

Q. Yes.

A. I have never been a receiver before, and as I understood it, I was receiver for the company, but my receivership did not abrogate my lease, and the company had a certain royalty, had a certain payment coming. If the mine paid, they were to get a certain percentage, and I made the receiver's report, the report as receiver, and also it showed the money received during the time I was receiver, the money received during that time.

COURT: Received from what?

A. Received from the operation of the mine, from the mining end of it, bullion and concentrates.

COURT: All the bullion mined, or the royalties only?

A. No, the whole thing, showing the total receipts from the mine.

COURT: That included the royalty and the ten per cent additional?

A. Yes, sir.

COURT: So that it included all the product of the mine?

A. It included everything. Yes, sir.

COURT: And you received that as receiver?

A. Yes, sir.

Q. That is, you took account of it as receiver?

A. Yes, sir.

Questions by counsel.

Q. Now, I see in this receipt that you received from bullion and concentrates \$11,662.96 in the month of January. That is correct, is it, Mr. Betts?

A. I think it is, yes sir.

Q. \$5,962.25 in the month of February, 1912, didn't you?

Page 330.

A. Yes, sir.

Q. And you received in the month of March, 1912, from bullion and concentrates—just bullion and concentrates?

A. Yes, sir.

Q. \$13,421.47, didn't you, Mr. Betts?

A. Yes, sir.

Q. Now, you received in April, 1912, from bullion, concentrates and Trading Company, and Standard Oil Company the amount of \$5,478.05, didn't you?

A. Yes, sir.

Q. You received in May, 1912, from bullion and concentrates and S. & F.—what is that?

A. S. & F. Forwarding Company, it says, forwarding account with the Railroad Company.

Q. Coffinberry and Witten—you received that month \$8,709.32, didn't you, Mr. Betts?

A. Yes, sir.

Q. In the month of June, Mr. Betts,, you received from bullion and concentrates and the store \$11,386.65, didn't you?

A. Yes, sir.

Q. Now, in the month of July, 1912, the month in which the boy was injured, you received from Ross, concentrates, and yourself \$2100—what was that \$2,100? Did you advance that \$2,100? What was that for, Mr. Betts?

A. Why, I was receiving no compensation as receiver, and as lessee I would credit my—

Q. Receiver account?

Page 331.

A. No, I would take money out of the—

Q. Receiver's fund?

A. No.

Q. Whom did you take money from?

A. I say, as lessee—I will get this straight.

MR. SMITH: I think the witness has a right to answer the question. If he doesn't answer it counsel's way, if it is the truth, it is just the same.

COURT: Yes.

A. As lessee, I would take money as I needed it for my personal expenses, and the bookkeeper didn't understand—made a mistake—and I kept

two sets of books, you understand, one as receiver and one as lessee, and he took money out of the receiver—well, let me see. I don't know how to make that plain.

Q. This is copied from your receiver accounts, isn't it? This is the receivership books, isn't it?

A. Yes, sir.

Q. This is copied from the receivership books?

A. Yes. And this amount was wrongly charged. It should have gone onto the lessee books, so when it was discovered, we credited the receiver account with that much money which had been drawn out.

Q. Well now, Mr. Betts, there is several thousand dollars—one hundred dollars, and \$3500, and and \$455, and \$1,000 and \$3,078. in concentrates. Where did you get those concentrates?

A. Mining.

Q. You got them from operating the mine?

A. Yes, sir.

It appears from his report that, during his administration as receiver, and prior to the time of filing his final report, he received \$71,681.27 and paid out \$781.81 more than he received. It also appears from his vouchers that, during his receivership and prior to such report, he purchased and acquired betterments and materials from the following named persons, for the following named purposes and for the following named amounts:

Voucher No. 581—H. B. Thomas:	
For transformers .....	\$ 119.70
Voucher No. 575—McKim & Co.:	
1 hoist .....	225.00
Voucher No. 571—Hawkins & Smith:	
For sawing timber.....	1575.00
Voucher No. 569—General Electric Co.:	
For electric supplies .....	97.38
Voucher No. 568—General Electric Co.:	
Fuses and wire.....	100.16
Voucher No. 561—Carlson-Lusk Hard- ware Co.:	
Rails, plates and bolts.....	488.37
Voucher No. 559—N. B. Booley:	
Hauling lumber .....	250.00
Voucher No. 554—Basche-Sage Hard- ware Co.:	
150 barrels cement .....	472.50
Voucher No. 617—Union Iron Works:	
Plates, brushes, etc.....	73.55
Voucher No. 613—S. & F. Forwarding Co.:	
Cyanide plant and machine supplies	416.98
Voucher No. 609—Walter L. Reed:	
Cyanide plant and other expenses...	140.00
Voucher No. 605—Alexander McDonald:	
Purchase five acres for power site	250.00
Voucher No. 598—Galigher Machine Co.:	
Machine parts .....	77.43
Voucher No. 584—Basche-Sage Hard- ware Co.:	
150 barrels cement, steel plates.....	246.50
Voucher No. 640—S. & F. Forwarding Co.:	
Betterments of machinery, cyanide plant, power repairs, etc.....	1332.68
Voucher No. 631—General Electric Co.:	
For machinery, etc.....	319.48

Voucher No. 622—Blue Mountain Iron Works:	
Dies and bucket .....	155.68
Voucher No. 650—Basche-Sage Hardware Co.	
Cyanide plant .....	62.70
Voucher No. 658—Denver Rock Drill & Machine Co.	
Mine repairs .....	139.50
Voucher No. 659—Galigher Machinery Co.:	
Mining supplies .....	215.66
Voucher No. 672—Triffilli Bros:	
Pig iron, coke, carload of coal.....	616.11
Voucher No. 687—General Electric Co.:	
Brushes and fuse .....	74.63
Voucher No. 691—E. P. Jamieson & Co.	
Drills, etc. ....	246.00
Voucher No. 692—Luce & Rosborough.:	
Betterments to machinery and cyanide plant .....	1523.27
Voucher No. 694—McKim & Co.:	
Ore bucket and cars.....	115.00
Voucher No. 695—Mine & Smelter Supply Co.:	
Six car trucks.....	177.00
Voucher No. 709—American State Bank:	
Timber .....	95.00
Voucher No. 713—Basche-Sage Hardware Co.:	
Powder .....	684.60
Voucher No. 720—Hawkins & Smith:	
Lumber .....	250.00
Voucher No. 740—Pay Roll:	
Cyanide plant .....	750.00
Repairs .....	407.80
Power labor .....	305.75
New power plant.....	82.50
Voucher No. 756—General Electric Co.:	
Tubes, sockets and lamps.....	138.03

Voucher No. 758—Galigher Machinery Co.:	
Screen rods, dies, etc.....	83.35
Voucher No. 763—Hughes & Co.:	
Boiler and stand.....	11.61
Voucher No. 765—International High Speed Steel Co.:	
Betterments .....	95.34
Voucher No. 767—Alexander McDonald:	
5 acres of ground and right-of-way	300.00

Making a total amount paid out for betterments and improvements of \$12,714.26.

In addition to such items it appears from the vouchers that the said Robert M. Betts paid himself a salary as receiver of \$350.00 per month, as follows:

Voucher No. 557—Robert M. Betts:	
Salary for January, 1912.....	\$350.00
Voucher No. 558—Robert M. Betts:	
Salary for February, 1912.....	350.00
Voucher No. 626—Robert M. Betts:	
Salary for March, 1912.....	350.00
Voucher No. 653—Robert M. Betts:	
Salary for April, 1912.....	350.00
Voucher No. 676—Robert M. Betts:	
Salary and other expenses.....	381.75
Voucher No. 711—Robert M. Betts:	
Salary and traveling expenses.....	455.00
Voucher No. 745—Robert M. Betts:	
Salary and legal expenses.....	384.00

Making a total salary paid to him as receiver, from January 1 to August 1, 1912, of \$2,620.75.

As evidenced by the receiver's vouchers there was paid to Emmett Callahan, as attorney for the receiver, the following amounts:

Voucher No. 538—Emmett Callahan:	
Legal services for December, 1911.....	\$100.00
Voucher No. 562—Emmett Callahan:	
Legal expenses for January, 1912.....	100.00
Voucher No. 592—Emmett Callahan:	
Legal services for February, 1912.....	100.00
Voucher No. 628—Emmett Callahan:	
Legal expenses for March, 1912.....	100.00
Voucher No. 654—Emmett Callahan:	
Legal services for April, 1912.....	100.00
Voucher No. 678—Emmett Callahan:	
Legal services for May, 1912.....	100.00
Voucher No. 715—Emmett Callahan:	
Legal expenses .....	100.00
Voucher No. 748—Emmett Callahan:	
Legal expenses .....	100.00

It thus appears that the receiver employed and paid an attorney from the date of his appointment to the 1st. day of August, 1912, at the rate of \$100.00 per month. There are many other and different facts which would show, or tend to show, that Robert M. Betts was engaged in the actual operation of this property as receiver under the order of the Court. While a large amount of money was received by the receiver in the operation of the plant, it appears that the property was operated at a small loss. Under the terms and conditions of the lease, The Cornucopia Mines Company of Oregon was to have and receive a royalty of 90 per cent on the net proceeds from the operation of the property. There were no net proceeds, and yet it appears from the receiver's own report and vouchers that, during all of that period when he claims to have been in possession of the property, and operating under the

terms and conditions of the lease, he was charging and receiving \$350.00 a month for his services as receiver, and that he employed and paid an attorney \$100.00 per month for advice and legal services to him as receiver. It also appears from such reports that, during that period, he actually purchased and paid for improvements which were placed upon the property to the amount of \$12,164.26, and that he purchased and acquired real property and rights of way for which he paid the sum of \$550.00

The lease does not anywhere mention or provide that he shall have and receive any salary from the company during the period of the lease. It nowhere authorizes him to employ an attorney for \$100.00 per month, or any other sum, at the expense of the company. It nowhere provides or contemplates that the lessee shall expend the sum of \$12,714.26 for betterments and improvements on the property.

It is true that the lease was executed prior to his appointment as receiver. It is also true that the order of the Court by which he was appointed authorized and directed him to take possession of and operate the property, and that the receiver as a witness on his own behalf testified that he did take possession of the property under the order of the Court. It is indeed strange that, if he was in possession of and operating the property under the lease, he would be charging the company and paying himself as receiver the sum of \$350.00 per month for his services as receiver, and that as such receiver he would employ an attorney and pay him \$100.00 a month

for legal advice and services to him as receiver, and that during that period he would make betterments and improvements on the property to the amount of \$12,164.26 and would purchase real property and rights of way to the amount of \$550.00, neither of which were ever contemplated, mentioned or provided for in the lease under which he claims to have operated.

The defendant testified that he was in possession of and operating this property as lessee. The order of the Court appointing him receiver, ordered and directed that he should take possession of the property and operate it as receiver. He accepted and qualified as receiver under that order, and there is nothing in the record appointing him that shows, or tends to show, that he was in possession of the property under a lease, or that any lease existed; and there is nothing in such record that shows, or tends to show, that the Court had any knowledge of the existence of such lease.

While it is true that Robert M. Betts as lessee was not made a party defendant in the foreclosure suit, it is a fact that he was appointed receiver in a suit to foreclose a trust deed or mortgage which was executed a long time prior to the execution of his lease, and it is a fact that any lease which Robert M. Betts had from The Cornucopia Mines Company of Oregon would be subject and inferior to the terms and conditions of the mortgage which was foreclosed in that suit.

The Court having made an order in the suit of

Hamilton Trust Company to take possession of and operate the property, and having appointed Robert M. Betts receiver, and he having qualified as such receiver under the terms and conditions of that order, and having taken possession under that order, he is estopped to claim or assert that he was in possession of or operating the property as lessee; and exclusive of the fact that he was appointed as receiver under that order of the Court and qualified as such and took possession of the property, there is ample and abundant testimony in the record to show that he was operating the property as receiver.

The words "Robert M. Betts, Lessee" were placed upon the vouchers with a rubber stamp, and while it is true that he testified such words were placed upon such vouchers at and before their payment, he is the only witness that testified to that fact, and it is very apparent that the jury did not believe what he said. It would have been an easy matter for such words to have been placed upon the vouchers with a rubber stamp after Bisher's injury, and in truth and in fact it appears from some of the vouchers, at least, that such words were placed thereon after they were marked paid, and, in any event, that would be a question of fact, and there is ample testimony to support the verdict on that point.

Again the report of the receiver itself is evidence of the fact that he was operating the property as receiver. He testifies on page 328 of the transcript:

Q. You took possession upon the order of the Court, didn't you?

A. Yes.

COURT: Received from what?

A. Received from the operation of the mine, from the mining end of it, bullion and concentrates.

COURT: So that it included all the product of the mine?

A. It included everything, yes sir.

COURT: And you received that as receiver?

A. Yes, sir.

Again on page 331:

COURT: Yes.

A. As lessee, I would take money as I needed it for my personal expenses, and the bookkeeper didn't understand—made a mistake—and I kept two sets of books, you understand, one as receiver and one as lessee, and he took money out of the receiver—well, let me see. I don't know how to make that plain.

Under the lease, the Cornucopia Mines Company was to have 90 per cent of the net proceeds from the operation of the property, and the property was operated at a loss and there were no net proceeds. Under that state of facts, how could the plaintiff in error take "Money out of the receiver?" And the jury could well have found, from his attempt to explain, that he was operating the property as receiver and was not operating the property as lessee.

If the plaintiff in error had been operating the property as lessee under the terms of that lease, no money would ever come into his possession as re-

ceiver. He never would have had any funds with which to pay himself \$350.00 per month as receiver. He never would have had any funds with which to pay his counsel \$100.00 per month for advice and legal services to him as receiver. He never would have had any funds with which to purchase and place \$12,164.26 in betterments and improvements on the property. He never would have had any funds with which to purchase and pay for real property to the value of \$550.00; and if he had been in possession of the property as lessee he never would have expended any amount in betterments and improvements on the property.

If he had been in possession of the property as lessee, he never would have installed a cyanide plant costing over \$3,000; he never would have purchased any of the items mentioned in the vouchers constituting the amount of \$12,714.26.

How, and upon what theory, can the plaintiff in error justify himself that he was in possession of and operating this property as lessee when he makes expenditures for betterments and improvements to the amount of \$12,714.26, and pays himself salary as receiver to the amount of \$2,620.75, and pays his attorney, for legal services to him as receiver, the sum of \$800.00, when he was not required to make any or either one of such payments under the terms and conditions of the lease. It is fair to assume that no rational, reasonable man, operating under the terms and provisions of a lease, would ever incur unnecessary expense for the sole use and benefit of,

the property to the amount of \$16,135.01, which he was not required to do under the terms and conditions of his lease. From such facts alone the jury would be amply justified in finding that he was not operating the property as lessee.

## V.

This action is founded upon Oregon's Employers' Liability Act, Session Laws of Oregon 1911, page 16; Lord's Oregon Laws, Volume 2, page XXXVI, and the instructions follow the provisions of that act, which, with the title, and insofar as it pertains to this case, are as follows:

“AN ACT. Providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law.”

Section 1. “All owners, contractors, sub-contractors, corporations or persons whatsoever engaged in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha or other material whatever, shall be

carefully selected and inspected and tested, so as to detect any defects, etc. And in the transmission and use of electricity of a dangerous voltage, full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using said electricity are liable to come in contact with the wire; and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent; and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally all owners, contractors or sub-contractors and other persons having charge of or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 2. "The manager, superintendent, foreman or other person in charge or control of the construction of works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee."

Section 5. "In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the structure, materials, works, plant or machinery of which

the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; the incompetence or negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act."

Section 6. "The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

Section 7. "All acts or parts of acts inconsistent herewith are hereby repealed."

Based upon that statute, the Court gave the following instructions:

"Now, I will call your attention to the statute in this case, and make such remarks with reference to it as I deem pertinent. The statute requires that all persons engaged in the erection or operation of any machinery, or in the 'manufacture, transmission, and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested, so as to detect any defects \* \* \* and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees

of the owner, contractor, or subcontractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent, and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and, generally, all owners, contractors or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.'

"This statute is intended to be an operative statute, and was intended also to permit persons to operate in certain occupations, or in the occupation, we might say, by specifying the transmission of electric energy. It was not designed by the statute to compel persons to go out of the business, but it was designed to protect persons or employees where the occupation is being carried on. And hence we might say in this case that the requirements of the statute were not designed to kill the business of the persons engaged in the transmission of electric energy, and you must give the statute, or the Court must, such reasonable construction as will permit people to go on with the work. And if it appears that the requirement of the statute will absolutely prevent people from operating any electric energy, why then we must give the

statute such reasonable construction as will permit persons to go on with the work. And in this connection I will give you an instruction which is asked by one of the parties:

“ ‘If you believe from the evidence that it was not practicable for the employer to insulate the wires at the place of the happening of the injury, and if you further believe that the weather insulation spoken of was not practicable to use at that place, then I instruct you that the law does not require a vain or useless thing to be done. All statutes must be read and construed and applied to human affairs by the rule of reason, and the duties which are imposed upon masters by what is known as the Employers’ Liability Law of Oregon are such duties and obligations as can be performed reasonably and efficiently, and no obligation is laid upon the master to place upon his business an expense in furnishing appliances, which are prohibitory either by the extreme cost or frequent renewals, which by the frequency of the renewal of such appliances would compel the employer to close his enterprise. If you, therefore, believe that it was not practicable for the employer to insulate the wires and keep them insulated as against shock at the place of the injury, then I instruct you, as a matter of law, that it was not the duty of the employer to attempt to insulate the wires with weather insulation and you cannot consider this failure to so insulate the wires and keep them insulated as negligence.

“You must take into consideration in this connection, gentlemen of the jury, whether or not the defendant could have insulated these wires as required by the statute and still continued his business. If it was too expensive to do that—if the expense laid upon the business by the insulation was such that the party must go out of business, or that it would render his

occupation unprofitable so that he could not operate, then you must determine from all the facts in the case whether or not he used due care and precaution—the utmost care and precaution, you might say in this case—in doing what he did do in the premises in the placing of these wires and leaving them uninsulated.

“You will determine further than this whether or not the defendant here used due care and precaution, such as I have defined to you that defendant must use in this case, in placing the wires upon the supports, the kind of support that was provided, and the distance the wires were placed from the supports, and the distance the wires were placed apart one from the other, and determine whether or not the defendant has used ordinary and due care, such care as is required when engaging in the transmission of this dangerous agency by a person who would exercise such care for the protection of his workmen.

“It is furthermore insisted that the defendant did not furnish the appliances that he should have provided in the present case. I refer to the furnishing of rubber gloves and pliers, and the body protectors that have been referred to in the testimony. It is the duty of the employer, as I have indicated before, to furnish proper appliances for use by the employees looking to their protection, and in this case there has been a good deal said about the rubber gloves, and about the defendant not having furnished rubber gloves when he ought to have furnished them. I will give you an instruction as follows:

“‘As to rubber gloves, I instruct you that if you believe from the evidence that the nature or character of the work in question was such that rubber gloves were not an essential requisite, then failure to furnish them would not be negligence.’

I think I should instruct you a little further as to the statute in this case, so that you may understand fully the relations existing here. The statute provides furthermore, that in all actions brought to recover from an employer for injuries suffered by the employee, the employer is made responsible for 'any defect in the structure, materials, works, plant, or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery, or appliances; the incompetence or negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow-servant done in obedience to the rules and instructions or orders given by the employer or any other person who has authority to direct the doing of said act.' This you will consider in connection with the question whether or not Harbert was a person authorized by the defendant to direct what Bisher should do, and whether or not he did direct him to assist in regulating these wires."

Such instructions are clearly within the provisions of the statute and follow the law, and under the statute are the law, and counsel for plaintiff in error do not question the validity of the law, and do not have any legal right to complain of such instructions.

## VI.

Under the instructions, all questions of fact were

fairly submitted to the jury and the jury found for the plaintiff; and under the record the verdict is conclusive.

In numerous cases the Supreme Court of the United States has decided:

“Where there is some evidence on the question of fact, it is error for the court to take the question from the jury.”

“Where there is evidence for the plaintiff sufficient to go to the jury, it is error to direct a verdict for the defendant.”

“Where the testimony presents matters of fact vital to the controversy, upon which the plaintiff has the right to the opinion of the jury, it is error of the court to withdraw the the case from the jury and direct a verdict for the defendant.”

“It is not proper for the court to instruct the jury ‘That upon the whole evidence the plaintiff ought not to recover,’ if any possible construction of the testimony would support the action.”

“Where the evidence adduced by the plaintiff, if uncontradicted, warranted the jury in finding a verdict in his favor, and defendant’s evidence did not make out an indisputable case, a refusal to direct a verdict for defendant is not erroneous.”

“If, upon any construction which the jury is authorized to put upon the evidence, or by any inference they are authorized to draw from it, the conclusion of contributory negligence can be justified, the defendant is not entitled to an order directing a verdict in his favor.”

“If there is any evidence reasonably tending to support the material allegations of the complaint, the case should be submitted to the jury.”

“Where two inferences may be legitimately

drawn from the evidence, one favorable and the other unfavorable to the defendant, a question for the jury is presented.”

“A motion for a nonsuit admits the truth of plaintiff’s testimony, and every legitimate inference of fact which may be reasonably deducible therefrom.”

It is fundamental that a verdict should be sustained where there is any testimony to sustain it, or where it can be justified from any probable or reasonable inference from any proven fact or facts. Many things happen in the court room which have an important bearing on the result of a jury trial. This is especially true from the action, appearance and conduct of the witnesses. In this case, the plaintiff in error filed a motion for non-suit and filed a motion for a directed verdict, each of which, as appears from the record, was promptly overruled by the Court without even an argument. His Honor, Judge Wolverton, presided during the trial of that case, heard the testimony of all the witnesses, and saw them while testifying, and it is very apparent that he thought there was no merit in such motions, and, while his legal opinion is not binding upon this Court, yet, owing to the fact that he presided at that trial, it is entitled to worthy consideration.

There are no valid, legal objections to any instructions which were given by the Court to the jury, and the jury heard the testimony of all the witnesses and saw them while they were testifying, and returned that verdict; and in overruling the motion, that verdict was sustained by the lower Court, and it

should not be set aside if there is any evidence or inference of fact to sustain it.

## VII.

Plaintiff in error complains at the introduction of some incompetent testimony, in particular as to climbers, belt and pliers.

The Court will note that all of such testimony went in without objection, and after it was in the record without objection, counsel then moved to strike it out "for the reason that there is no risk alleged to have been occasioned by them at all. It simply encumbers the record."

Under that state of facts, if it was error at all, it would not have been prejudicial error. If counsel desired to object to such testimony, it was their duty to object at the proper time and in the proper way, and they cannot wait until such testimony is in the record without objection, and then move to strike it out for the reason stated, and assign the overruling of such motion as error.

This same rule of law applies to the assignment of error No. 2.

Again, the Court will note, it appears from the record, that all of the issues which were made and presented in the trial of the case by the defendant in error, were met and presented in the testimony on behalf of the plaintiff in error. Plaintiff in error has no legal right to complain at the trial of the case on immaterial issues, when he met those issues by counter testimony on such issues. And, in any

event, such testimony could not be, and was not, prejudicial.

### VIII.

The Court charged the jury fully and fairly on all of the issues made by the pleadings, and anyone reading such charge must admit and concede that it was fair and impartial, and presented all of the issues to the jury in an intelligent, clean-cut manner—in plain, concise language—and that there are no instructions of which the plaintiff in error has a legal right to complain.

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Since preparing our points and authorities we have been served with a copy of the brief of plaintiff in error, and there is no occasion to discuss the remaining points designated in our brief.

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### **REPLY ARGUMENT TO BRIEF ON BEHALF OF PLAINTIFF IN ERROR.**

We have carefully read the brief of the plaintiff in error, and, legally speaking, but two questions are presented in the brief. First: That the Court had no jurisdiction, and, Second: That there is no testimony to support the verdict.

There is no question as to jurisdiction. As stated, all of the authorities cited by plaintiff in error are old decisions, founded upon the old statutes; and the accident to Bisher grows out of an **act** or **transaction** of the **receiver** in carrying on the business and the operation of the property under the order of the

Court, and under the **facts in this case**, counsel have not cited, and will never be able to find an authority, sustaining their position.

Counsel for plaintiff in error requested a number of instructions. Their instructions numbered one, two, three and four are, in legal effect, to return a verdict for the defendant.

Their instructions numbered five, six and seven were given as requested.

Their instructions number eight would invade the province of the jury, and is not the law and should not have been given.

All that portion of instruction number nine, commencing with the words "As to rubber gloves," and ending with the words "Would not be negligence." was given as requested. The remaining portion of instruction number nine is not the law and should not have been given.

Under the facts in this case, it would have been error to give instruction number ten, and the substance of it was fully covered by the general charge. Johnnie Bisher was a boy 18 years of age, and is not shown to have had any knowledge or skill in or for the work in which he was employed, and it clearly appears from the testimony that he was following the instructions of his superior, and nothing was ever said to him by anyone about rubber gloves.

Instruction number eleven is not the law and should not have been given.

Instruction number twelve is not the law. It would invade the province of the jury on a material

fact, and, insofar as it is the law, is fully covered by the general charge.

Instruction number thirteen was given by the Court in the identical language in which it was requested.

It clearly appears that the Court gave to the jury all of the instructions which were requested by plaintiff in error that it should have given under the law, and that, as a matter of fact, the Court did give plaintiff in error's requested instructions numbers five, six, seven, nine and thirteen, and that the remaining instructions which were requested and not given were not the law and would invade the province of the jury. We are at a loss to know why counsel for plaintiff in error, in the "Transcript of Record," or in their brief, would try to create the impression that the Court did not give their requested instructions numbered five, six, nine and thirteen and only gave their instruction number seven.

The brief of plaintiff in error contains numerous excerpts from the testimony of different witnesses on different features of the case, and based upon such excerpts only, counsel endeavor to show there is not sufficient testimony to sustain the verdict. From an examination of the transcript of the entire testimony, it will appear that there is other and competent testimony which flatly contradicts such portions set out in the brief. They seem to assume, because there was **some** testimony on behalf of the plaintiff in error to sustain the issues which were

made by the pleadings, that it is the duty of the Court to set aside the verdict and to grant a new trial, without regard to **any** of the testimony in the record which sustains the issues made by the pleadings in behalf of the defendant in error; and they assume that, because the plaintiff in error claimed that he was operating the mine as the lessee, that fact should be taken as true, and that the defendant in error was not entitled to recover. They overlook the fact that that question was fairly submitted to the jury under the instructions of the Court, and found in favor of the defendant in error.

They also overlook the fact that the decree in the suit of Hamilton Trust Company vs. The Cornucopia Mines Company, et al, expressly provides that the receiver shall execute a deed to the property mentioned and described in the trust deed or mortgage, and that at the **time** such deed is executed, the purchaser shall be let into possession of the property, and that such deed was not executed by the receiver until the 20th day of November, 1912—four months after Bisher sustained his injury. We concede that, under the laws of Oregon, from the date of the sale, the purchaser is entitled to the possession, but there is nowhere in the record any evidence which shows, or tends to show, that the purchaser at such sale ever did take possession of the property, or that he ever claimed that he took possession of such property.

The law says that the purchaser "Shall be entitled to the possession of the property purchased,"

and it is necessary for him to take possession before he can be in possession. Counsel say "The purchaser immediately on the day of sale, took possession of said property under the foregoing statute." There is nothing in the record upon which to base that statement.

During all of this time this property was under the jurisdiction of the Court and in its control and possession by and through its receiver, and the purchaser would not be entitled to the possession of the property except by or through an order of the Court.

Commencing on page 49 of the brief of plaintiff in error under "STATEMENT OF FACTS," counsel give certain excerpts from the testimony, and based upon such excerpts, claim that their motions for non-suit and for a directed verdict should have been sustained, and they cite some authorities, none of which are decided under the Employers' Liability Act of Oregon, which makes a radical change in the relations between Master and Servant in the operation and construction of high tension wires. And on page 62 of their brief, under the head "INSUFFICIENCY OF EVIDENCE," they assume that Bisher was a volunteer, and based upon that **assumption**, claim that the verdict cannot be sustained.

The question as to whether or not Bisher was a volunteer was fairly and squarely submitted to the jury under the instructions of the Court in plaintiff in error's requested instruction number five, which was given by the Court.

And again, counsel assume that, because there was some evidence on behalf of the defendant in the action tending to show that Bisher was a volunteer, such testimony must be taken and accepted as true, without regard to the testimony on behalf of the plaintiff in the action to the effect that he was **not** a volunteer, and that he was following the instructions and doing what he was told to do by his superior. This clearly appears from Bisher's testimony:

Page 46 of the Transcript of Record:

Q. What did Mr. Buxton tell you to help Harry Harbert to do?

A. He didn't say just what to do. He just said, help Harry. He said Harry would tell me what to do.

Q. Well, what did Harry tell you to do?

A. Well, Harry climbed the pole, and I just carried some of the tools along first, and he went up the pole and fixed three or four himself. Then he told me, he says, "Well, it is pretty hard standing up there so long." He said, "We will take turns about." He said "You come up and fix one, and I will fix the next one." I said, "All right," because Buxton told me to do what he would tell me; that he would tell me what to do. He went up there, and told me to fix one and he would fix the other one. He said it would be easier on both of us. We did that for a few times. He worked a day or two that way, and then he saw that was pretty hard standing up there so long for one man, and he said, "We will

both come up at the same time.” He says, “One can wrap one end of the tie wire while the other wraps the other.” He said, “We can do it quicker,” and he says “We can watch each other at the same time,” and he said, “Maybe we won’t get no shock if we watch each other. Maybe it will make it safer,” And that is the way we were doing when I was injured.

Page 48:

A. About the same distance.

Q. What did Harry tell you to do?

A. Well, he just said to fix—he didn’t say just what to do then, because he told me what to do before.

Q. What did he tell you to do before?

A. He told me to wrap one end while he wrapped the other. He says, “We can do it quicker.”

Q. What did you do when you got up on top of the pole?

A. Well, he had already had one end of the middle wire, tie wire, unwrapped, and I unwrapped my end, and took the middle wire in my right hand and started to lift it over the pole, as we had been doing before.

Q. Why did you lift the wire over the pole, or did anyone tell you to do that, Johnnie?

A. Harry told me to do that.

Q. What did he tell you to do that for?

A. Well, to keep it farther away, so it wouldn’t be apt to touch the other wire.

Q. Now, what happened when you were lifting this wire?

A. I just started to lift the wire up with my right hand. I was standing just—the wire came nearly to my shoulders—just about that high. I had to get up high enough, because they were pretty heavy. I just started to lift up the middle wire, and that is the last I remember.

Q. Johnnie, what tools or appliances did Mr. Betts furnish you with at the time that you were set to work upon that line, if any?

A. I never worked on the line before excepting just this time.

Q. A little louder Johnnie.

A. I never worked on a line before until this time.

Q. Did they furnish you with any tools?

A. Well Mr. Harbert, Harry Harbert, gave me a pair of climbers and a belt, and a pair of pliers.

Page 52:

Q. Did Mr. Buxton, the foreman at the power house, give you any orders, Johnnie?

A. He just told me to help Harry; that he would tell me what to do.

Q. That Harry Harbert would tell you what to do?

A. Yes, sir.

Page 53:

A. You mean, what did Harry tell me to do?

Q. Yes.

A. When I first started to work with him, I just carried insulators and wires and he went up the pole himself. Then after working about three or four days, or not quite that long, I guess,—

Q. A little louder.

A. After we had worked about two days, then it was pretty hard work for one man, he said, and he said it got tiresome up there, he said we would take turns about. He said I could climb one and fix it, and he would climb the next one. So we did that for a time. And then one man standing up there so long would get tired, and he said, “We will both go up at the same time.” He said one could wrap one end of the tie wire, while the other wrapped the other end; we would do it quicker; and he said we could watch each other at the same time, and wouldn’t be so apt to get a shock. So that is what we were doing when I was injured. We were both up the pole.

Page 56:

Q. Why were you lifting this middle wire over here, Johnnie?

A. Well, Harry told me we would lift it over, and that would make it further away from this one, so we could fix this one without getting a shock.

Q. When you were lifting this middle wire, did you use one or both hands?

A. I just started to lift that one with my right hand, one hand.

Q. And then you were between these two wires?

A. My head was between these two wires.

Q. Who told you to do it that way?

A. Harry Harbert.

Q. Where is Harry Harbert?

A. Standing there (pointing to Harbert).

Page 71:

Q. Did he ever tell you that it might become necessary for you to climb the pole?

A. He told me just to help Harbert.

Page 73:

A. I don't know what they wanted me for there. He just told me to go down there. He told me to help Harbert.

Because there is **some** testimony tending to contradict this testimony of Bisher, the plaintiff in error asks the Court to set aside the verdict. All the witnesses were present and testified in open court, and the jury found that young Bisher told the truth, and it is very apparent from the character of his testimony, and the manner in which he testified, why the jury would make such a finding. And yet, in the face of such testimony, and the requested instruction number five of plaintiff in error, which was given by the Court, and the findings of the jury, and the overruling of the motions for non-suit and for a directed verdict, counsel wants the Appellate Court to find as a fact that young Bisher was a volunteer, and for that reason ought not to recover.

On page 79 of the Brief of plaintiff in error it is said: "We desire the Court to bear in mind that the complaint does not state facts sufficient to con-

stitute a cause of action in this; it fails to allege when Bisher received the double contact, or what caused him to receive it."

"The evidence does not disclose how, or why, or when, or in what manner, or in the discharge of what duty he became entangled in the wires. Therefore, the complaint is clearly insufficient."

This statement is not worthy of consideration. Any and all of the facts and conditions and surrounding circumstances at the time of the accident were detailed to the jury; and it was caused by neglect to comply with the terms and provisions of the Employers' Liability Act of the State of Oregon, and through the failure to insulate the wires, and the stringing of said wires at an insufficient distance from the poles or supports to permit repairmen to freely engage in the work.

On page 82 of the Brief it is said "THIRTY INCHES IS THE REGULAR SPACE TO WORK BETWEEN." The statute does not contain any such provision. It provides: "Live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock." Generally, parties in interest shall "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and with-

out regard to the additional cost of suitable material or safety appliance or device.”

Hence, the question as to the **proper space** between electrical wires, for the safety of workmen, is a question of fact, and of fact only, to be decided by the jury, and by the jury only, under proper instructions, which the Court gave. It is not a question as to what **some** witness testified is the regular space, but it is for the **jury** to say, under the facts, what is the **proper space**.

It is true that Johnny Bisher knew and testified that the transmission wires were alive and carried 2300 volts, but that fact has nothing to do with this case, and even if it did, the testimony shows that he was an inexperienced boy, and that he was doing that work in the manner in which he was told to do that work by his superior.

### “THE FAILURE TO SUPPLY RUBBER GLOVES.” Page 99.

Under this head the Brief quotes from the testimony of Robert M. Betts, in which he testifies:

Q. Did you ask him, Bisher, if he wanted any rubber gloves, or needed any?

A. No, sir.

Q. You didn't?

A. No, sir.

And for such reason, and based on such testimony, it is claimed that the plaintiff in error was not negligent in his failure to supply rubber gloves, and yet, on page 321 of the Transcript of Record, this same witness, as to rubber gloves, testified:

Q. Did you have any?

A. No, sir.

Q. You did not have any?

A. No, sir, never have had any there.

Page 323:

Q. You are not an electrician yourself, are you?

A. No, I am not.

Q. Just common knowledge that told you that that was a precaution?

A. Yes, sir, I had heard that it was a precaution.

It is very apparent that counsel, in the preparation of their Brief, have taken excerpts of the testimony which would tend to support their theory of the case, and have carefully omitted anything which would tend to support our theory of the case, and they apparently assume there is no testimony in the record on behalf of the defendant in error.

On page 108 of their Brief they quote the testimony of one witness to the effect that "It is their option as to using them." And on the same page they also quote this testimony of the witness Kennedy for the plaintiff in the action:

Q. What is the custom of the average employer requiring linemen to use rubber gloves?

A. In the last three years they have all forced me to take rubber gloves or not work.

And yet, in the face of such testimony, they want to make it appear that the use of rubber gloves was a matter in the discretion of the workmen.

"AN ABSOLUTELY SAFE WAY KNOWN TO BISHOP," page 116 of the Brief. Referring

to Bisher, it is said: "At the time he was hurt, there was a distance between the outer right hand wire and the middle wire of 30 inches, in which he could have placed his body and supported himself by holding on to the pole and the cross-arm, and been absolutely safe."

That is a statement of counsel, and counsel only, but it is no evidence that he would be safe in that or any other position on those poles while he was engaged in the **work** which he was employed to do.

"UNINSULATED TRANSMISSION WIRES,"  
Page 118 of their Brief.

The statute made it the duty of the defendant to "Use every device, care and protection which it is practicable to use for the protection and safety of life and limb, etc.," and under this statute the Court gave very fair and liberal instructions for the defendant, and there was strong testimony on behalf of the plaintiff in the action tending to show that it was both feasible and practicable to insulate the wires; but, for the reason that the defendant in the action introduced some testimony tending to show that it was not feasible or practicable, counsel now claim that the verdict was against the instruction under the head of "SUFFICIENCY OF EVIDENCE," "POINTS AND AUTHORITIES," on page 149 of their Brief counsel make a summary of what the evidence fails to show and what the evidence does show. Such statements are all **assumptions** of counsel, and are in **conflict** with the **verdict** of the jury.

There is testimony in the record tending to prove the following facts:

I.

That Johnnie Bisher was a bright and intelligent boy, 18 years of age.

II.

That he was inexperienced in the construction or operation of power transmission lines.

III.

That he was in the employ of Robert M. Betts as receiver.

IV.

That while engaged in such employment, and doing such work as he was instructed to do, and while at the **place** where he was directed and authorized to be, and doing his work in the **manner** in which he was **directed** and **instructed** to do his work, sustained serious personal injuries.

V.

That the injuries were caused, without any fault or negligence on his part, by his coming in contact with an electric power transmission line charged with 2300 volts.

VI.

That such lines where he was at work were *not* insulated and were **not** strung at such a distance as to permit repairmen to freely engage in their work without danger of shock.

VII.

That he was not furnished with rubber gloves or

other safety devices which were practicable for the protection and safety of his life and limb, and that he sustained such injuries by reason of the failure of the plaintiff in error to use every device, care and precaution which it was practicable to use for the protection and safety of his life and limb, and that the wires were not strung at a sufficient distance to permit him to freely engage in his work without danger of shock, and by reason thereof he sustained the injuries of which he complains.

### VIII.

That he was in the employ of Robert M. Betts as receiver, and that Robert M. Betts, as such receiver at the time of such injury, was in the possession and operation of the property where the injury occurred, and is liable to him as such receiver.

As stated, through their Brief, counsel for plaintiff in error have presented two questions, and two questions only, to be considered on this appeal:

First: That the trial court did not have jurisdiction of the defendant in the action.

Second: That there is no evidence to support the verdict of the jury.

The one is a question of law without any authority to sustain it. The other is a question of fact, and of fact only, and is not sustained by the record and is without merit. It is founded upon the **assumption** and the **assumption** only, of counsel that, because there is **some** testimony in the record which tends to prove the issues on behalf of the defendant

in the action, the Court must assume, as a matter of law, that the plaintiff in the action was not entitled to recover. On this appeal they ask this Court to ignore, and eliminate from the record, any and all the testimony tending to support the allegations of the complaint, and to set aside the verdict and grant a new trial because there is **some** testimony tending to support the theory of the defendant in the action; and it clearly appears from the brief of plaintiff in error that **such** are the reasons, and the **only** reasons, for this appeal, and a careful examination of the testimony, records and instructions will justify that statement.

There are no legal questions presented in the record. It is for such reasons, and such reasons only, and with all due respect to opposing counsel, that we have only cited two authorities. The only question involved on this appeal is a question of fact, and the judgment should be affirmed.

Respectfully submitted,

BOOTHE & RICHARDSON, and  
CHARLES A. JOHNS,

Attorneys for Defendant in Error.

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IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

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MEIER & FRANK COMPANY, a Corporation,  
Appellant,

vs.

R. L. SABIN, as Trustee in Bankruptcy of Italian Restaurant Co., a Corporation,  
Appellee.

---

Appeal from the District Court of the United  
States for the District of Oregon.

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TRANSCRIPT OF RECORD.

CEIVED

JAN 5 - 1914

J. MONCKTON,  
CLERK

FILED

JAN 14 1914

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IN THE

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Appellee.

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**Names and Addresses of Attorneys  
upon this Appeal:**

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**For Appellant:**

Joseph & Haney, Corbett Bldg., Portland, Oregon

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**For Appellee:**

Sidney Teiser, Portland, Oregon

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*In the District Court of the United States for the  
District of Oregon.*

Be it remembered, that on the 22 day of September, 1913, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit:

**[Amended Bill of Complaint.]**

*"In the District Court of the United States for the  
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate of  
Italian Restaurant Company, a corporation,  
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,  
Defendant.

To Hon. Chas. E. Wolverton and Hon. R. S. Bean,  
Judges of the District Court of the United States for  
the District of Oregon:

R. L. Sabin, Trustee of the estate of Italian Restaurant Company, a corporation, brings this his amended bill of complaint against Meier & Frank Company, a corporation, and complains and says:

**I.**

That at all the times hereinafter mentioned said Meier & Frank Company, a corporation, was, ever since has been, and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

## II.

That heretofore, to wit, on the 19th day of May, 1913, a petition in involuntary bankruptcy was filed in this court against the Italian Restaurant Company, a corporation, and that the said Italian Restaurant Company, a corporation, was thereafter duly adjudged a bankrupt.

## III.

That thereafter an order of reference was duly made by this court referring the said matter of Italian Restaurant Company, a corporation, bankrupt, to Chester G. Murphy, a Referee in Bankruptcy of this District, residing in the City of Portland, for the proper administration of said cause as provided and required under the act of July 1, 1898, 30 Stat. at L. 544, as amended, commonly known as the Bankruptcy Act of 1898 as amended.

## IV.

That the first meeting of creditors for the examination of the bankrupt was duly called by said Referee and duly held on the 24th day of June, 1913, and that upon said date plaintiff, R. L. Sabin, was duly elected Trustee of said estate.

## V.

That plaintiff, R. L. Sabin, duly qualified as Trustee of said estate in bankruptcy by filing the required bond, which bond was duly approved and ordered filed, and has ever since acted and is now acting as Trustee of said estate in bankruptcy.

## VI.

That amongst the claims and petitions filed with the Referee in said cause was a petition and claim of Meier & Frank Company, a corporation, praying for the recovery of certain property hereinafter set forth in paragraph VIII hercof. That your Trustee resisted, and objected to the allowance of the claim and petition of said Meier & Frank Company, a corporation; that a hearing was duly had thereon before the Referee and testimony adduced by and on behalf of said Meier & Frank Company, a corporation, in support of said claim and petition. That the Referee decided and held against the validity of said claim and petition of said Meier & Frank Company, a corporation, and ordered said property to be held as the property of the estate by the Trustee, and that the claim to said property as to said Meier & Frank Company, a corporation, is *res adjudicata*.

## VII.

That at the first meeting of creditors of said estate plaintiff herein as Trustee was authorized and empowered and directed to sell the property of said bankrupt coming into his hands, and pursuant to said authority he has offered the property of the said estate for sale. That amongst said property offered for sale by said Trustee is the said property heretofore claimed by said Meier & Frank Company, a corporation, as set forth in Paragraph VI. That the highest bid for said property so claimed as aforesaid by said Meier & Frank Company, a corporation, was the bid

of J. T. Wilson for \$..... That your Trustee has accepted said bid of J. T. Wilson for said property, subject to the approval of the Referee, believing the same to be a fair bid for said property. That the Referee has approved said sale and that the property is ready to be turned over to the said J. T. Wilson upon the payment of the price bid therefor by him.

### VIII.

Notwithstanding the determination of the question as to the ownership of said property by the Referee in Bankruptcy as hereinbefore set forth, the defendant herein, Meier & Frank Company, a corporation, instituted an action in the Circuit Court of the State of Oregon for the County of Multnomah, on the 11th day of September, 1913, against said J. T. Wilson, for the recovery of the following property, claiming the same as belonging to it, the said Meier & Frank Company, a corporation:

433½ yards carpet  
 3 bales lining  
 16 yards padding  
 5 rugs  
 24¼ yards linoleum  
 1 sweeper  
 1 settee  
 4 rockers  
 152 chairs  
 14 tables  
 132 table tops

104	table cloths
17	table pads
20	doz. knives
2	steak knives
3	pr. carvers
20	doz. forks
2	oyster forks
1	doz. table spoons
20	doz. tea spoons
10	doz. desert spoons
55	doz. napkins
1	sugar bowl
6	meat covers
9	soup tureens
8	coffee pots
6	Venetian shades
8	V shades & over drapes
1	over drape
7'	brass pole
2	pr. sockets
2½	doz. rings
2	pr. portiers
17 1-3	yds. velous
1	pr. curtains valance
3	cushions
20	S. pads
1	cabinet
½	doz. C. sacks
12	doz. towels
4	combs

- 1 door mat
- 10 yds. canvas

### IX.

That in addition to bringing the suit aforesaid, the said Meier & Frank Company, a corporation, has made open and public demand for said property, and has threatened publicly and openly to enter suit against any party to whom the Trustee may transfer said property, or any party who may come into possession of the same.

### X.

That said action instituted by said Meier & Frank Company, a corporation, against J. T. Wilson, in the Circuit Court of the State of Oregon for the County of Multnomah, and said threats to bring such further action against such persons as may come into possession of the said property from the Trustee by conveyance or otherwise, has had the effect of depreciating the value of the property of said estate in bankruptcy, and has created a cloud upon the title thereto and causes the Trustee to be hampered and harrassed in his endeavor to dispose of the property for its fair value, and said Trustee cannot now because of said action and threats of said defendant obtain a fair price for said property.

### XI.

That although the Trustee is ready to consummate the said sale to the said J. T. Wilson by delivery of the property to him, the said J. T. Wilson refuses to receive the property unless he can obtain the same

free of any litigation or claim thereto which will be litigated against him, unless the Trustee guarantees and warrants the title to the same.

## XII.

In order to sell the said property at a reasonable price, that said action and threats of said Meier & Frank Company, a corporation, will either cause the Trustee to warrant the title to said property, which said Trustee refuses to do for the reasons that are apparent, or cause the said Trustee to enter suit against the said J. T. Wilson for specific performance of the contract or for the purchase price thereof, which proceeding would be costly to the estate and which your Trustee does not believe would be equitable on the part of said Trustee since the said J. T. Wilson bid upon the said property without knowledge of the fact that there was any cloud thereon, or that he would have to take the same and litigate title thereto, and especially as he bid upon the same for the purpose of obtaining immediate possession thereof for the purpose of conducting an immediate sale of the same.

## XIII.

That efforts have been made to sell the said property to others but the Trustee has not been successful in obtaining a fair price for said property subject to the present conditions.

WHEREFORE, plaintiff prays that this Honorable Court may determine the rights of the Trustee in said property and remove the cloud from the said

title, and that the said Meier & Frank Company, a corporation, its agents, employees, and attorneys, be enjoined and restrained from further prosecuting said action instituted by it against said J. T. Wilson; that T. M. Word, Sheriff of the County of Multnomah, be enjoined and restrained from levying upon the said property or in any way interfering with the same, and that he be required and ordered to release the said property if he has already levied upon the same; that the said Meier & Frank Company, a corporation, its agents, employees, and attorneys, be further enjoined and restrained from instituting any further suits or actions whatsoever for the recovery of said property; that the said Trustee be awarded his reasonable cost and disbursements in this behalf expended, together with a reasonable attorney's fee on behalf of his attorney, and for such other and further relief as to equity may be meet, and to this court expedient.

R. L. SABIN,  
Plaintiff.

SIDNEY TEISER,  
Attorney for Plaintiff.

[Endorsed]: Amended Complaint in Equity. Filed Sep. 22, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of September, 1913, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

**[Answer to Amended Complaint.]**

*In the District Court of the United States for the  
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate of  
Italian Restaurant Company, a corporation,  
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,  
Defendant.

Comes now the defendant in the above entitled suit,  
and answering the amended complaint filed herein,  
respectfully shows and alleges as follows:

I.

Defendant admits the truth of Paragraphs I, II, III,  
IV and V of said amended complaint.

II.

Answering Paragraph VI of said amended complaint, this defendant denies that amongst the claims and petitions filed with the Referee in said cause was a petition and claim of defendant praying for the recovery of certain property mentioned in Paragraph VIII of said amended complaint, or that said defendant filed with said Referee any claim or petition whatsoever relative to said property; and, further denies that said Trustee resisted or objected to the allowance of any claim or petition of said defendant, for the reason, among others, that none was filed with said Referee or Trustee; and, denies that a hearing was duly or at all had herein before said Referee, or

that testimony was taken on any claim or petition so filed on behalf of said defendant in support of or relation to any claim or petition of defendant; and further denies that said Referee decided or held against the validity of said claim or any claim or petition of said defendant, or ordered said property to be held as the property of the Estate by the Trustee, or that the claim to said property by defendant is or ever was adjudicated as between the plaintiff herein and defendant, or is as to any matter or claim relative thereto res adjudicata.

### III.

Answering Paragraph VII of said amended complaint, this defendant denies any knowledge or information sufficient to form a belief as to the truth or falsity of the matters and things therein set forth, excepting that this defendant has been informed that the sale of said property mentioned in Paragraph VII was made to said J. T. Wilson and that said sale had been confirmed.

### IV.

Answering Paragraph VIII of said amended complaint, this defendant denies that notwithstanding the determination of the question as to the ownership of said property by said Referee, as set forth in the amended complaint, the defendant herein instituted the action mentioned in said paragraph, but this defendant avers that an action was commenced in its name, but that the same was not commenced after any hearing before said Referee or before any Court

as to the rights of the parties hereto in and to said property described in said Paragraph VIII.

V.

The defendant admits the truth of Paragraph IX of said amended complaint.

VI.

Defendant denies each and every allegation contained in Paragraph X of said amended complaint, and avers that said property has been sold to said Wilson by said Trustee and said sale thereof confirmed, and that said Wilson is legally bound to pay said Trustee therefor.

VII.

Answering Paragraphs XI, XII and XIII of said amended complaint, this defendant denies any knowledge or information sufficient to form a belief as to the truth or falsity of any of the matters and things therein set forth.

WHEREFORE, this defendant having fully answered the amended complaint herein, prays that this proceeding may be dismissed, and for judgment against the plaintiff herein for the costs and disbursements incurred by this plaintiff, and for such other and further relief as to the Court may seem just and equitable.

JOSEPH & HANEY,  
Attorneys for defendant.

[Endorsed]: Answer to Amended Complaint.  
Filed Sep. 30, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 11 day of October, 1913, there was duly filed in said Court, a Decree, in words and figures as follows, to wit:

[Decree.]

*In the District Court of the United States for the  
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate of  
Italian Restaurant Company, a corporation,  
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,  
Defendant.

Before Hon. CHAS. E. WOLVERTON, Judge of  
the District Court of the United States for the Dis-  
trict of Oregon, this 6th day of October, 1913:

This cause coming on this day to be heard upon the  
Amended Complaint in Equity of R. L. Sabin, Trustee  
in Bankruptcy of the Estate of Italian Restaurant  
Company, a corporation, Plaintiff, and the Answer of  
Meier & Frank Company, a corporation, Defendant,  
and upon the testimony and evidence adduced at the  
trial thereof by both Plaintiff and Defendant, and  
upon argument of counsel, and it appearing that the  
Defendant by reason of its action in the State Court  
and of its threats to enter further action to recover  
the property set forth in said Amended Complaint  
against any person to whom the Trustee may convey  
the same, has created a cloud upon the title to the  
said property, and it further appearing that the Trus-

tee's title to said property is good and valid, and the attempted claim by said Defendant by reason of its conditional bill of sale upon the said property is not good, and that the said bill of sale is of no effect as against said property, and it further appearing that the said Meier & Frank Company, a corporation, has no claim whatsoever against the said property,

IT IS ORDERED AND DECREED

that the property set forth in said Amended Complaint be, and the same is hereby declared to be the property of the Plaintiff as Trustee in Bankruptcy of the Estate of Italian Restaurant Company, a corporation, and the said Defendant, Meier & Frank Company, a corporation, its agents, employees, and attorneys, be, and they hereby are enjoined and restrained from bringing any suits or actions to recover the said property, or in any way making any threats or claim to the same whatsoever.

AND IT IS FURTHER ORDERED AND  
DECREED

that the said Trustee be awarded his reasonable cost and disbursements in this behalf expended, taxed at \$51.92.

R. S. BEAN,  
Judge.

Dated at Portland, Oregon, this 11th day of October, 1913.

[Endorsed]: Decree. Filed Oct. 11, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of November, 1913, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:

[Stipulation as to Statement of Evidence.]

*In the District Court of the United States for the  
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate of  
Italian Restaurant Company, a corporation,  
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,  
Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that the testimony, as the same was adduced at the trial of this cause, and the decision or opinion of the Judge, transcribed by the stenographer, shall be printed verbatim, identically in the same manner as it was taken, and shall stand as the statement of the facts in this cause on appeal.

SIDNEY TEISER,

Attorney for plaintiff.

JOSEPH & HANEY,

Attorneys for defendant.

[Endorsed]: Stipulation. Filed Nov. 22, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of November, 1913, there was duly filed in said Court, an Order, in words and figures as follows, to wit:

[Order Settling Statement of Evidence.]

*In the District Court of the United States for the  
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate of  
Italian Restaurant Company, a corporation,  
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,  
Defendant.

Upon reading and filing the stipulation, annexed hereto, and upon motion of the attorneys for the defendant herein,

IT IS HEREBY ORDERED that the testimony, as the same was adduced at the trial of this cause, and the decision or opinion of the Court stenographer, shall be printed verbatim, identically in the same manner as it was taken, and shall stand as the statement of the facts in this cause on appeal.

R. S. BEAN,  
Judge.

Dated November 21, 1913.

[Endorsed]: Order. Filed Nov. 22, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 18 day of October, 1913, there was duly filed in said Court, Evidence in words and figures as follows, to wit:

## [Evidence.]

*"In the District Court of the United States for the  
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate of  
Italian Restaurant Company, a corporation,  
Plaintiff,

v.

MEIER & FRANK COMPANY, a corporation,  
Defendant.

CHESTER G. MURPHY, called as a witness on  
behalf of the trustee, being first duly sworn, testi-  
fied as follows:

Direct Examination.

Questions by Mr. TEISER:

Mr. Murphy, you are the referee in bankruptcy for  
this district?

A. For this county, yes.

Q. And I believe you were the referee to whom  
the Italian Restaurant Company matter was referred  
in bankruptcy?

A. Yes, sir.

Q. That is admitted in the pleadings. Do you  
recall any controversy arising as to a claim of Meier  
& Frank to certain property held by the trustee in  
this particular matter, on or about July 14th of this  
year?

A. Yes.

Q. I will hand you this affidavit, and ask whether  
you made that affidavit in this proceeding.

A. Yes.

Q. Is the fact set forth in that affidavit true. Mr. Murphy?

A. The facts, in my recollection, are that, in the course of administration of this estate, there was a claim presented, or notice reached me that Meier & Frank claimed a portion of the fixtures over there under some kind of a contract, and some one was in to see me about it, and I know that the trustee's attorney, Mr. Teiser, had the matter up with me, and I suggested they have a hearing on it so they could arrive at the facts, in order that the administration of the estate might be expedited. It was upon my suggestion that we had a hearing, and Mr. Teiser and Mr. Haney—I think it was Mr. Joseph appeared; in fact, I know it was Mr. Joseph that appeared, with Mr. Kiernan, on behalf of the claim of Meier & Frank. There were numerous other creditors present, and several attorneys, and upon taking the matter up either I called attention to the fact, or attention was called to the fact that there was no reclamation petition. The trustee was in possession of the personal property, and there was no petition by the creditors for reclamation. So on discussion between Mr. Joseph and Mr. Haney—between Mr. Joseph and Mr. Teiser, I asked Mr. Joseph if they made claim to this. He said "We certainly do." And I said there was no claim filed, and to my very best recollection, and it is very clear in my mind, why, they agreed that the claim would be—I mean, the petition would be treated

as filed, and go ahead and take testimony in support of the claim. The testimony of Mr. Kiernan was given, and they discussed the facts, and the exhibits were examined, and I made the ruling that, in my opinion, title had passed, and that there was no conditional contract of sale out against this property, and directed the trustee to sell it. And a few days later Mr. Teiser came in to see me about the matters in this estate; and whether he was there then or not—but I called up Mr. Joseph, and asked him if they would want to take a review in that matter, because the record was not clearly made up, and if he wanted to take a review I wanted to give him plenty of time, to ask for a review—I wanted to give him plenty of time; and if not, direct the trustee to go and sell it, because I wanted to adjust the affairs. And he said they were going to take no review; that they were going to wait until it was sold, and then follow it in the hands of the purchaser. So then I said, "I will go ahead and request the trustee to sell it." That is my recollection of everything I know about the Meier & Frank account.

Q. When you ruled upon this question as to the right of Meier & Frank to this particular property, was it done with the idea and understanding in your mind that a claim had been filed by Meier & Frank for it?

A. I treated it—I understood that it was understood the claim was filed, and they were submitting the matter, and the claim would come in later. But

that ruling was adverse. They made no claim, and I called up Mr. Joseph about it. And he said they would do nothing further, and follow the goods in the hands of the purchaser.

Examination by the Court.

Q. Did you make the ruling as though the claim was there?

A. Yes, sir.

Q. That was the understanding, that you should adjudicate the matter there?

A. Yes. That was what they were there for, with their papers and exhibits, and they should come in and have a hearing on this claim. I didn't like to go ahead and proceed with it, because there was no reclamation petition.

Direct examination continued.

Q. Do you recall whether you called the stenographer to take down the testimony, or who called her?

A. I don't recall, Mr. Teiser.

Q. All right.

A. I don't recall that it was reported.

Q. Yes, it was reported.

Cross Examination.

Questions by Mr. HANEY:

The creditors had been there on another matter, had they not, Mr. Murphy?

A. There were a number of creditors there, Mr.

Haney, and whether it was just a meeting of creditors and Mr. Joseph had been notified, or whether this came up as a special meeting, I can't recall. My record will show.

Q. As a matter of fact, Mr. Kiernan and Mr. Joseph left, leaving you and the other creditors on this other matter, after this was all over, did they not?

A. I think other matters were discussed and passed on.

Q. Yes, the meeting of the creditors was not called for this purpose?

A. I would have to look at the record. There was no written notice sent.

Q. Do you know how Mr. Joseph came down—whether he was telephoned to from your office to come down?

A. I don't recall. I talked to Mr. Joseph several times.

Q. Before this?

A. I think we had some before—some 'phone conversation.

Q. Did you know before this time there was no claim filed? Did you know prior to this meeting that the Meier & Frank Company had filed no claim?

A. Oh, yes, I knew there had been no claim filed.

Q. Had you asked them prior to this time if they were going to file a claim?

A. Yes.

Q. And as a matter of fact, either you or some one from your office telephoned to him for some one to

come down there to that meeting, did they not?

A. I don't know about that, Mr. Haney.

Q. When he came there, who was with him? Who came with him?

A. I don't remember. Probably there were ten or twelve men in the office, when I came in, he was either in the office then or came in when I was having the papers before me on my desk.

Q. You don't know whether Mr. Kiernan came down with him or not, do you?

A. No, I don't.

Q. At that time he started to tell you the claim of the Meier & Frank Company, the position they were taking in the matter, did he not?

A. I think it came up, Mr. Haney, as I stated, that I asked him if they claimed those goods.

Q. Yes.

A. And then the question next came—he said they certainly did, and they had Mr. Kiernan there with the original records.

Q. Did you ask him then if he had filed a claim?

A. I told him there was no claim filed here, no petition in reclamation.

Q. Then is when you say you understood him to say he would file a claim?

A. My recollection is that he stated we would treat it as filed, by agreement with Mr. Teiser, and later file it, and go ahead and take the testimony on it.

Q. When did Mr. Teiser make up this record—at that time—was that before or after Mr. Kierman had

taken the stand?

A. Oh, we went right ahead with that at that time, I think, Mr. Haney.

Q. At that time, do you remember whether or not you in any manner assisted in making up the record by correcting anything that Mr. Teiser may have said to the reporter?

A. No, I don't. I haven't seen the testimony, and I don't know what questions I asked. I wanted to be informed myself on it.

Q. Do you recall whether or not Mr. Joseph insisted that this be treated as an informal proceeding before you?

A. No, I don't recall it.

Q. Didn't he tell you, as a matter of fact, that they hadn't filed a claim and didn't intend to file a claim?

A. Not to my recollection, no, sir.

Q. Didn't he tell you that he had come there merely to acquaint you with Meier & Frank's position in this matter?

A. Well, my recollection is that he came there to get an order on the trustee releasing this property and presenting the claim.

Q. Who was it asked Mr. Kiernan to testify, do you remember?

A. No, I don't.

Q. As a matter of fact, didn't you request him to testify?

A. I don't recall it. The testimony ought to show.

Q. Do you recall just what was said by Mr. Jos-

eph, about the time of his departure, concerning bringing an action to recover the property?

A. When he was leaving the office?

Q. Well, I presume it was about the time he was leaving.

A. They left in the midst of the meeting, I remember, Mr. Kiernan and Mr. Joseph, and stated they still claimed the property.

Q. What was said about bringing an action for the recovery of it?

A. I don't recollect.

Q. You don't remember of them saying anything about that?

A. No, I don't. It is some time ago, Mr. Haney, and, of course, it is not a personal matter with me, and it is a question of getting at the facts as to the sale of this merchandise.

Q. Do you recall that he told you that Meier & Frank didn't intend to file a claim in this matter, but would pursue the goods and attempt to recover them from anybody that got possession of them?

A. He told me that afterwards on the 'phone, when I wanted to be sure he had time to make what appearance he wanted to.

Q. That was not at the meeting?

A. Not to my recollection, no.

Q. Do you recall whether you told him that he should do that—go ahead and sue in any court he saw fit, at the meeting?

A. I don't recall that, no. I don't see why I

should.

Q. Just what claim did you pass upon there, Mr. Murphy?

A. I passed upon the question whether they were entitled by means of the reclamation petition to take these goods out.

Q. All of the goods?

A. All of the goods from Meier & Frank.

Q. Considered the claim as a whole, did you?

A. Yes.

#### Redirect Examination.

Q. Mr. Murphy, if Mr. Joseph had said to you at the time of this hearing, that he would not, or did not intend to file a claim, would you have heard the matter?

A. No.

(Excused.)

J. T. WILSON, called as a witness on behalf of the trustee, being first duly sworn, testified as follows:

#### Direct Examination.

#### Questions by Mr. TEISER:

Mr. Wilson, did you agree to purchase from Mr. R. L. Sabin, trustee in bankruptcy of the estate of the Italian Restaurant Company, certain property which was made a claim by Meier & Frank as their property?

A. I did, yes.

Q. Do you know whether Mr. Sabin offered to deliver that to you?

A. What is that?

Q. Did Mr. Sabin offer to deliver that property to you?

A. Yes, he offered—he was going to deliver it to me.

Q. Did you accept delivery?

A. No, I hadn't accepted delivery. I was just about to accept delivery when there was action brought by Meier & Frank against me.

Q. Why didn't you accept delivery of the property?

A. Because I couldn't get the title. The title was in dispute.

Q. What was it your purpose to do with this property if you bought it?

A. I intended to have an auction sale right there on the place. By their stopping it, I don't suppose I should seek it now—it would reduce the price of the property, as far as I am concerned; I couldn't give as much for it.

Q. If some one brought suit and took that property, the property would be of no use to you, would it?

A. No, it wouldn't be of any use if they took the property away.

#### Cross Examination.

Questions by Mr. HANEY:

Have you the property now, Mr. Wilson?

A. No, I have not.

Q. You haven't taken it yet?

A. No.

Q. You bid upon it, however?

A. I bid on it, yes. My bid was accepted, but it was not handed over to me.

Q. Do you expect to pay the same amount?

A. Well, no, I don't know, because if I could have sold it on the place where it is—where it was, I had made arrangements to sell it. Now, if the action is brought, it is not worth as much to take, because it is worth more to auction it right there than to take it out. It is peculiar kind of property.

Q. You expect to bid again on it?

A. Yes, but I wouldn't bid near as much on it as I did before.

#### Redirect Examination.

Q. How much did you bid before, Mr. Wilson?

A. \$750.

(Excused.)

O. S. CROCKER, called as a witness on behalf of the trustee, being first duly sworn, testified as follows:

#### Direct Examination.

Questions by Mr. TEISER:

Mr. Crocker, what is your business?

A. I am adjuster for the Merchants Protective Association.

Q. Is Mr. R. L. Sabin connected with it?

A. Mr. R. L. Sabin is secretary of it.

Q. What connection did you have with the estate of the Italian Restaurant Company, if any?

A. I took charge of it for Mr. Sabin, and invoiced it. Also showed it to the parties wishing to buy it.

Q. Did you attempt to get any offers for the property?

A. Yes, I got quite a number of offers on different lines of goods there.

Q. Was the offer that you obtained on the property at which Mr. Wilson offered to purchase the highest offer that you could obtain?

A. Yes, that was the highest I have been able to.

Q. Did you make much of an effort?

A. I showed a great many people the stock at different times, yes.

Q. His was the highest offer?

A. His was the best offer, yes.

Q. Do you think you could get as good an offer for that property in the present state of the uncertainty of title? That is, you understand the situation of the property?

A. Yes. No, I don't think it could be sold under the circumstances, if the title was not clear.

Q. When you took charge of this property, how did you first ascertain that Meier & Frank had a claim upon the same, or made a claim upon the same?

A. Either Mr. Pearson or the cashier of the restaurant told me that there was a contract on that goods.

Q. And what did you do?

A. I went up to the office of Meier & Frank, and I believe there was a lady in charge there, who gave me a list of the goods. I wished to know which goods they were, so I could specify in my invoice what was claimed by Meier & Frank, or supposed to be claimed by Meier & Frank.

Q. Did you obtain a copy of the agreement from Meier & Frank?

A. Yes, they gave me a copy of their contract and also a list of the merchandise.

Q. I hand you this agreement and the invoices attached thereto, and ask you if they are the papers you received from Meier & Frank.

A. Yes, those are the papers that I got there.

Mr. TEISER: I would call for the original of this contract, Mr. Haney, if you will produce it.

Mr. HANEY: I think I have the original here. I am not sure. (Produces it.)

Mr. TEISER: I will introduce the copy along with the original.

Mr. HANEY: I would like to withdraw the original.

Marked "Trustee's Exhibit A."

(Excused.)

Mr. TEISER: I would like to introduce a copy of a letter written to Meier & Frank. It is admitted by Mr. Haney, I understand, that this is a copy and they received the letter.

Mr. HANEY: Yes. That is the copy that we introduced.

COURT: Very well. Let it be introduced.

Mr. TEISER: I will introduce it, your Honor, for the purpose of giving what is the fact.

Marked "Trustee's Exhibit B," and read as follows:

"Re:

Italian Restaurant Co.

July 1, 1913.

Meier & Frank Co.

Portland, Oregon.

Attention Credit Dept.

Gentlemen:

The Trustee has completed an inventory of the property of the Italian Restaurant Co., and amongst the property inventoried by him as belonging to the estate are various goods sold to the Italian Restaurant Co. by your firm.

I understand that these goods are claimed by you under a conditional contract, but as it is very questionable whether the property can be held under your conditional contract, the Trustee is claiming the property and taking possession of the goods as the property of the estate. If, however, you desire to maintain your claim to the goods, I would suggest that you make a demand for them before the Referee without delay, so that the ownership of the same may be settled.

I have endeavored to see Mr. Joseph, your Attorney, at the suggestion of Mr. Kiernan, but have been unable to get in touch with him. I am accordingly sending him a copy of this letter.

Yours truly,

Sidney Teiser,

Atty. for Trustee.

T|C

c|c Mr. Joseph, Atty."

Mr. TEISER: I would like the privilege of resting, and after Mr. Joseph testifies on the morrow, placing Mr. Gebhardt on the stand.

Mr. HANEY: No objection.

W. E. Kiernan, called as a witness on behalf of the claimant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. HANEY:

Your name is W. E. Kiernan?

A. Yes, sir.

Q. Where are you employed, Mr. Kiernan?

A. Credit man at Meier & Frank.

Q. Were you acting as credit man at Meier & Frank's during the months of, say, well, June and July?

A. Yes, sir. The last three years.

Q. You have been there for three years past?

A. Yes.

Q. I will ask you if you recall the incidents leading up to a meeting at Mr. Murphy's office about the 14th of July last?

A. Yes, sir.

Q. In which the Italian Restaurant Company was involved?

A. Yes, sir.

Q. Prior to going to that meeting, had you had a talk with anybody representing the Merchants' Protective Association, or Mr. Sabin?

A. Mr. Teiser.

Q. About how long before the meeting at Murphy's office did that conversation occur?

A. I should think it would be about three weeks—two or three weeks.

Q. Do you recall receiving the original of that letter that is referred to?

A. Yes, sir.

Q. Did you have a talk with Mr. Teiser shortly after, or about the time of the receipt of that letter?

A. Well, it was round about that time. It was before that time really.

Q. What was that conversation? What did he say and what did you say?

A. Mr. Teiser wanted duplicate bills and a copy of the contract, which we gave him, and he and I went into a discussion regarding the whole transaction.

Q. What was said about Meier & Frank's rights in that matter?

A. Well, I will explain that over in our office we prepare all claims of bankruptcy—

Q. Who prepares all claims of bankruptcy?

A. I personally do.

Q. You personally prepare all Meier & Frank's bankruptcy claims?

A. Yes.

Q. Go ahead.

A. When this matter came up, I called up Mr. Joseph, and told him that the letter had been received, and he says, "Well, that is all right. Don't pay any attention to that." And then on the morning of this

day down in Mr. Murphy's office he 'phoned me, and said there was going to be an informal meeting down in Mr. Murphy's office, and he wanted me to bring a copy of the contract and also the ledger cards.

Q. The ledger accounts at Meier & Frank's are kept by card index, are they not?

A. Yes.

Q. Each one stands separate?

A. Yes.

Q. Go ahead and tell just what happened at Murphy's office.

A. Do you want to hear the whole transaction, your Honor?

Q. Yes.

A. Shortly before this contract was entered into, Mr. Everett and Mr. Pearson, representing the Italian Restaurant, came to our credit department to make arrangements regarding credit. Of course, it was a corporation. I had very little faith in the enterprise myself—I didn't think it would be a paying proposition. However, we went into a contract, by which they paid us—this was the contract here. At that time they wanted to buy merchandise. I forget what department it was. I can see here they wanted to get some furniture, and they also desired to have us take over the frescoing of the apartment or room. The frescoing cost something like \$600—\$650, that was it. It was done by some outside people. They were to charge that to Meier & Frank, and we were to pay them. They paid us \$750 cash on that day.

Of course, we would have to pay the contractor \$650, which would make \$100 money received for \$412.50 worth of merchandise. Later they came in—at that time they were going to distribute the buying around the city, the purchase of the other material, but they changed their minds then, and bought furniture from us, and crockery, and as they were bringing the sales checks up I had a good deal of telephoning to do with Mr. Pearson about this, and on one occasion left my office and went down to his place of business, and told him that they would have to make larger payments. Our regular contracts—we have three thousand of these contracts, and they are generally one-third or one-fourth down and the balance monthly payments. On this occasion we were holding \$1041 worth of charges. And Mr. Pearson then paid \$450 more, and we continued until the entire contract—every time they bought something and added to this contract, they added merchandise to this contract, we added payments to the contract. I may state that we have something like three thousand contracts. I think that probably 2900 of those are done in the same way. Other firms which I know, their contracts are made out—for instance, you might come into our place, and say “We desire \$500—\$600 worth of furniture, and we desire to pay \$150 down.” And then in going through the store furnishing up a house, it frequently runs as high as seven or eight hundred dollars. That is where our trouble comes. They get into us. Because in our business we are not able to

keep sale-checks together, and they are apt to go over—never under. Therefore our terms sometimes are too small for the amount of merchandise purchased.

Q. What was the agreement about all of the furniture and crockery that was sold by Meier & Frank?

A. It was all to be sold under a contract; that was. the title was to be in Meier & Frank.

Q. The title was to be in Meier & Frank until the full amount was paid off?

A. Yes. We also opened an open account with them, that is, for merchandise sold where we didn't claim title to it.

Q. That is a separate account from this?

A. That is a separate account from this; not this account here. It is a different number—5129. This is a lease, as you will see, your Honor, it has an "L" in front of it, with another number, being two different accounts—two different parts of our ledger.

Q. That open account, you make no claim for the ownership of any of the property sold under it?

A. No. In that respect, we are like the other creditors.

Q. Who else did you deal with representing the restaurant company except Mr. Pearson?

A. I talked to Mr. Everett—C. V. Everett, and I talked to Mr. Pearson, was the only ones I talked to—Mr. Everett, Everett and Pearson were the prime movers in it. And Montrezza signed this for me, the secretary. I went to their office and had it signed up.

Q. There has been something said about what

Schedule "A" was, referred to in this contract.

A. They are the itemized bills of the purchases. They are taken directly from the sales-checks.

Q. At the time that contract was signed, I mean, at the identical date the signatures were affixed, was there any Schedule "A" there at all?

A. There was not.

Q. Was there anything affixed to it marked "A"?

A. There was not. There never was on the three thousand contracts we have, it has never been done. It is impossible to do it.

Q. But the agreement was that all of the goods purchased, as furniture and crockery, by the Italian Restaurant Company, was to be under a lease contract?

A. Absolutely.

Q. Otherwise, would you have given them that much credit?

A. We wouldn't have given them any credit.

Q. Did they have anything to give them credit on?

A. They didn't have anything to give them credit on. As a matter of fact, their credit having been without taking title to the property, it was so perishable, the nature of it, that I insisted upon Mr. Pearson guaranteeing the payment of it, and also Mr. Everett, personally. Aside from being officers of the company, they had to sign it personally.

Q. That was because it was crockery, which was perishable stuff?

A. In opening an account, I put the limit on it of

\$100. The reason I put it as high as \$100 is that I sold them merchandise on this contract, and I didn't feel like holding them down to any less than \$100.

Examination by the Court.

Q. I understand you have this contract and also an open account?

A. Open account.

Q. Also the personal guarantee of those other people?

A. Yes, sir.

Q. On that account?

A. Yes, sir. Mr. Pearson didn't understand the signing of a contract. He said he never had signed one. He was very reluctant about signing it. I said we couldn't go into it, absolutely wouldn't go into it unless we could keep the title. They were very anxious. I told them as long as we kept the title in our name, that the probabilities are that following around six or seven months we would break even.

Direct examination continued.

Q. I will ask you, Mr. Kiernan, whether any of the other creditors knew that this property was held down there under a lease-contract by the Restaurant Company?

A. Every credit man in the city of Portland selling them must have known that, because different mercantile agencies knew it. That is, several creditors called us up—for instance, several of the stores around town called us up, and asked us about our

dealings with them. Of course, they knew we were putting the goods in there. They wanted to know how we were selling them. We told them all under contract.

Q. I will ask you to detail to the court what happened, to the best of your recollection, at Mr. Murphy's office, at the meeting on July 14th.

A. Mr. Joseph 'phoned me, and told me to bring the Italian Restaurant contract and our ledger cards over, as there was to be an informal meeting before Mr. Murphy. The reason of the holding of the said informal meeting—I asked him what was the nature of it, what they intended to do about it. He had told me what he intended to do about it, and—of course, it is immaterial what he said, but he said he thought they were not treating him just right. And he said to let them go ahead, that he would follow that property wherever it went, and he wasn't going to file any claim down there, or file any claim with the referee in bankruptcy, as he thought our position was so plain that he didn't want to do it. And at the time Mr. Teiser sent for a stenographer—

Q. Was that after you and Mr. Joseph got there?

A. Yes.

Q. There was no stenographer there when you got there?

A. She might have been in a different room.

Q. Go ahead.

A. But he dictated—I don't know what the legal name is, but the standing of it, what it was for. Mr.

Joseph objected to it, and it was changed—told him it was informal, it was understood it was informal. There was a meeting there. Mr. Everett was there to be asked certain questions by the trustee, and they took it up after we left.

Q. What was said about Meier & Frank filing a claim, if anything, to the best of your recollection?

A. Well, it was understood in my mind positively that we were not to file a claim.

Q. What was said by anybody about it?

A. Mr. Joseph said at that time we would not file a claim, did not propose to file a claim.

Q. Did Mr. Murphy ask him if he had filed a claim?

A. Yes, he told him—Mr. Murphy—he hadn't filed a claim, didn't propose to, there was no need of it. Because we talked that matter over going over. I knew Mr. Joseph's thoughts in the matter, what he intended.

Q. What was said, if anything, about the remedy that Meier & Frank might attempt to invoke here?

A. Just before we left, Mr. Teiser said, "Well, Mr. Joseph, I presume"—I don't know whether he said presume, but anyway, "If you replevin it, you will replevin in the United States Court," said Mr. Teiser. Said Mr. Joseph, "I don't know what court I will replevin in. I don't intend to replevin it until it is sold."

Q. Do you recall any conversation between Mr. Murphy and Mr. Joseph to the effect that Mr. Joseph agreed to consider the claim as filed, and take testi-

mony on that basis?

A. I know positively that was not agreed to, because it was not according to Mr. Joseph's thoughts. He had told me what he intended to do. Coming up he had told me what he intended to do.

Q. Who?

A. Mr. Joseph outlined his plan, what he intended to do. If I may tell it all, he said he thought these fellows were horsing us around a little bit, and he said he didn't intend to let them.

Q. Who asked you to take the stand and be sworn down there—Mr. Joseph?

A. Mr. Murphy.

Q. Mr. Murphy did?

A. Yes.

#### Cross Examination.

#### Questions by Mr. TEISER:

Mr. Kiernan, you say that at the meeting before Mr. Murphy I started to dictate a statement?

A. Yes.

Q. Do you recall the effect of what I started to dictate?

A. Well, I know you started to do something. Mr. Joseph immediately corrected you, and said this was not a formal hearing.

Q. I started to dictate something?

A. Yes.

Q. So as to make it appear it was a formal hearing?

A. I won't say as to that; but I presume it must have been; otherwise, he would not have objected.

Q. Did the stenographer start to take it down when I started to dictate?

A. Yes.

Q. Did I get very far in the dictating?

A. Not very far, not when he stopped you.

Q. Mr. Joseph stopped me?

A. Yes.

Q. And the stenographer scratched it out, I suppose?

A. I don't know what she did.

Q. She wrote it down while I was dictating, did she?

A. I don't know about that.

Q. Do you think I would have started dictating something and the stenographer not started writing it down?

A. You ask me if she started doing it?

Q. Yes.

A. Yes, she started doing it, I presume, because it was done so fast, you see. How far she had got along in the course of her dictation, I don't know.

Q. What do you think the purport of what I had started to dictate was?

A. Well, I think you was trying to get it that it was a formal meeting before the referee in bankruptcy, something that Mr. Joseph was particularly determined you shouldn't.

Q. Well, now, when you came down to Mr. Mur-

phy's office, you say he 'phoned you to bring the—

A. Ledger cards and the contract.

Q. Did you bring the contract?

A. Yes, sir.

Q. Did you present it to him?

COURT: Did Mr. Murphy do that, or Mr. Joseph?

A. Mr. Joseph.

Q. Did Mr. Joseph bring the contract?

A. Yes, sir.

Q. Did he present it to Mr. Murphy?

A. Yes, sir.

Q. It was there?

A. Yes, sir, it was there. That is, I think it was there. Wasn't it there, Mr. Teiser?

COURT: How much is due on the account now?

A. \$1648.46. Yes, I know the contract was there. The original, I think, was there. There is no question about it.

Q. Well, now, it is stated in the testimony, in the transcript of the testimony taken by the stenographer, the question is asked, "Have you a copy of the agreement which was entered into at that time?"

A. Yes.

Q. You answered, "I have the original"?

A. Yes.

Q. "Q. The original? All right, just offer that in evidence."

A. Yes.

Q. "Thereupon original Conditional Sales agree-

ment was offered in evidence and for identification marked "Creditors' Exhibit A." Is that correct?

A. Yes, sir.

Q. You filed the original in evidence, and it was marked "Creditors' Exhibit A"?

A. No, I won't say that I filed it.

Q. Well, it was filed?

A. Well, they took it from my hand, yes.

Q. How did it get back in your possession?

A. Mr. Murphy filed it. Is the original there? You will find on the back of it Mr. Murphy's writing.

Q. That is Mr. Murphy's writing, is it?

A. Yes, sir.

Mr. TEISER: I call attention to that, your Honor. "Creditors' Exhibit A" in Mr. Murphy's handwriting.

A. You see this has been left at Meier & Frank's all the time since.

Q. This portion of the paper that is pasted on there was not there at the time, was it?

A. Which portion of the paper?

Q. These statements?

A. Yes, all that.

Q. That was there all the time?

A. Yes.

Q. Are you quite positive about that?

A. Oh, there is no question about that.

Q. That this whole thing was there?

A. There is no question about it.

Q. Why would you think Mr. Murphy would write "Creditors' Exhibit" there in that condition?

A. Well, I don't know why he would do that. But there isn't a bit of question. There, that is my writing, don't you see that figure there. And I was very particular to see that, because this is the original, don't you see, and your copy was made from this.

Q. Now, as a matter of fact, Mr. Kiernan, wasn't that original contract filed with the papers in Mr. Murphy's office?

A. That?

Q. Yes.

A. No.

Q. It remained still in your possession?

A. Yes. Mr. Murphy gave it back to me after the stenographer had marked it; he gave it right back to me. Never intended to be filed, because, as I say, it is one of our agreements. I couldn't very well leave it there.

Q. Now, you stated, Mr. Kiernan, that when this contract was entered into—well, let's get a little further about the meeting at Mr. Murphy's office. You said I came up to see you prior to that meeting to get a copy of the contract?

A. Yes.

Q. Do you remember who was with me?

A. There was some man with you, yes.

Q. Mr. Crocker, wasn't it, the gentleman here?

A. Yes.

Q. You gave me a copy of it? As a matter of fact, I had a copy of it, didn't I? What I wanted was the invoices?

A. I think you did have a copy of it.

Q. You made some—

A. Yes, you had it or something, and I said that—  
if I remember rightly, I was a little bit peeved because  
they did a lot of extra work there.

Q. Yes, that is right. That was the invoices that  
was attached.

A. Yes. It should have come to me, you see, and  
I should have told them what to give you. You were  
not interested in the clerk numbers, or anything like  
that, and I showed them how ridiculous it was to  
put all those clerk numbers and dates and amounts.

Q. You were rather peeved that they gave it to  
us, weren't you?

A. I could see that they did a lot of extra work.  
And then I didn't like it—those matters were in my  
hand, belonged to my department, should have come  
to me.

Q. You were peeved at them about that, not at us?

A. Oh, no, not at you. I talked with you about  
it. I believe I got the ledger card and showed you  
all about it.

Q. You said you spoke to me about matters con-  
nected with the claim or controversy?

A. Yes, you came up. We weren't running to  
you. You were running to us.

Q. What did I say to you about that controversy,  
and what did you say to me?

A. You told me—in what respect?

Q. Any respect. You said I talked to you about it.

A. You talked to me about the contract not being—in your estimation not being valid as to attaching creditors, or in a case where there had been a claim of bankruptcy.

Q. Was there anything else said about it?

A. Well, just refresh my mind about it. That is pretty hard. We talked it generally, and I showed you the figures, the ledger card, and also showed you the contract.

Q. There wasn't anything said bearing upon the hearing at Mr. Murphy's office?

A. Oh, no. That hadn't been talked of, because I said that we didn't intend to file a claim.

Q. Did you say that you didn't intend to file a claim?

A. Oh, yes, I told you we didn't intend to file a claim.

Q. Now, what is the amount of your open account by the card that you have there?

A. \$13.05.

Q. What are those amounts made up of?

A. Well, I haven't the merchandise here, Mr. Teiser.

Q. I mean, what separate amounts?

A. There is \$10.05 in March, and then there is \$13 in March. When they didn't pay their March bill, we marked it "Send everything C. O. D." They bought other goods, and we sent them C. O. D. We didn't want to have any further business with them on a credit basis, although they had been making their

payments regularly on their contract.

Q. Now, they had been making payments regularly?

A. On their contract. But we didn't want their credit business on open account.

Q. Now, this contract, as I understand from your testimony, was to be how much down—\$750 down?

A. Yes.

Q. And the balance of how much—\$100 a month?

A. \$100 a month, yes.

Q. And I think you testified something about requiring them to pay \$250 at one time, did you?

A. Yes, before these goods were actually delivered.

Q. You required them to pay \$250 more?

A. No, let me explain that. I don't think that is right. Before this original purchase was delivered—but before it was ready for delivery—they came in and made the other purchases. All these goods were delivered at one time.

Q. All of them?

A. All of them were delivered at one time. All the merchandise went at one time. They all went within, I should imagine, two or three hours of each other.

Q. Do you remember what date it was that they went there?

A. Well, I guess it was along about the 28th of December.

Q. The 28th of December?

A. Yes. All this merchandise was purchased, Mr. Teiser, and selected within three or four days of each other—ten days at the very most—although you will see the payment here was made, \$750 was paid; you see, that was for the frescoing, and they paid that before we authorized the men to go ahead and work on it. It took them, of course, almost a month to do that work—three weeks.

Q. Now, as a matter of fact, they paid on that contract exactly \$1500, didn't they? Or they paid \$1500 on the contract, didn't they?

A. Yes, \$1564.60. That represents merchandise—  
COURT: That includes the \$600 for frescoing?

A. Yes, that includes the \$600 for frescoing.

Q. That was \$750 payment made on November 26th?

A. Yes.

Q. \$250 payment on December 21st?

A. Yes.

Q. That was before the goods were delivered?

A. Oh, yes. You see here, they were almost a month, you know, in getting that frescoing work done, and then the last moment they came in, for the reason that we knew they went around town trying to get credit, but they couldn't get credit, don't you see, and then they came back to us to make these additional purchases.

Q. On the 27th day of December there was \$200 paid?

A. Yes, sir.

Q. The 22nd day of January there was \$100 paid?

A. Yes, that is the first payment.

Q. And on March 5th there was \$100 paid?

A. Yes.

Q. And on April 8th \$100 paid?

A. Yes.

Q. Those payments which I have called off amount to \$1500, do they not?

A. Yes, \$1564.

Q. No, these, I mean, that I have called off?

A. Yes.

Q. And they are the only even payments that they made to you—round numbers?

A. Yes, sir, absolutely. All this merchandise was selected within ten days, and all delivered at once. All the goods went the same day.

Q. Now, these other payments were made for goods purchased, as a matter of fact, there is \$9.00 for interest here, isn't there?

A. Yes, sir.

Q. And there is \$8.60 for interest?

A. Yes.

Q. And these other payments were payments on goods purchased and taken out, were they not?

A. No. Maybe I haven't made myself clear, Mr. Teiser.

Q. Just let me ask you this: What was the 90-cent payment for?

A. 90-cent payment?

Q. Yes. They paid you 90 cents, or there is credit

given them for 90 cents.

A. I don't know what that 90 cents is for.

Q. You don't think they came in and paid 90 cents on their account?

A. No. I don't know what that 90 cents is for. I will tell you what I think it is, though. I think that this was something that they didn't want charged; says he, "I will pay for it." But the sales-check had already gone through on a charge, don't you see, and it would make a difference of our cash sales, and inasmuch as the goods had gone through on a credit sale, we would have to put it on the account, unless we got at the original check and changed it from charge to pay transaction; and inasmuch as it had gone through, why, they just paid it on their account.

Q. Do you know what the \$23.00 payment was for on the 27th day of December?

A. Yes, that was on a similar proposition. That was handled through Mr. Frank, because they wanted some merchandise charged on that, and he says, "No, we got enough;" they had enough.

Q. They paid cash?

A. Well, they said "We will give you \$23 more," whatever it is; he O.K.'d it.

Q. That was a cash payment, was it?

A. No, it was on the account. For instance, he might have went \$70 more or \$75 more, and they said, "We will pay \$23 and charge it up."

Q. He paid this \$23.00?

A. Yes, but you see he wanted to charge about \$60

more. I was fighting with Mr. Frank, the owners of the business against this contract. And Mr. Frank, when we got this \$23.00—that was the incident—I remember he spoke to me about it, since you refresh my memory—they got \$50 or \$60, something like that, so he said, “I got half cash. Charge the rest of the account up.”

Q. What is the payment of \$23?

A. That is merchandise returned.

Q. And the \$7.20?

A. Is merchandise returned, yes.

Q. And what is the \$1.50 for?

A. That is merchandise returned.

Q. Is that merchandise returned?

A. That is merchandise returned, yes.

Q. So the only item in addition to the \$1500 on the bill that you think was obtained on the contract, or paid on the contract, was \$23.00?

A. Yes, that is an allowance, that \$1.50.

Q. An allowance?

A. Yes. What date is that \$23.00? Maybe I can tell you.

Q. It was the 27th day of December.

A. The 27th day of December?

Q. Yes, \$23.

A. Well, I couldn't tell you what that is.

Q. Now, you say that all these goods were gotten at the same time?

A. Delivered at the same time, yes.

Q. Delivered at the same time?

A. Yes.

Q. And they were delivered about the 28th day of December?

A. Yes, sir. They were trying—they were making herculean efforts to get that through by the first of the year. They wanted to open the first of the year.

Q. All of it was on the contract?

A. Every bit of it, absolutely.

Q. And was understood at the time?

A. Absolutely.

Q. And all the goods were chosen by the 28th of course, had to be, if it was delivered by then?

A. Yes, sir.

Q. Will you explain why goods amounting to \$1369.72 were dated January?

A. Yes, because we close our books, don't you see—we closed our books in December—I should imagine we closed our books on December 26th.

Q. So from December 27th on, you would date it—

A. January, yes.

Q. January?

A. Yes. The same as you get your bills. We advertise, don't you see, all purchases for the last five days of the month go on the next month's bill.

Q. Well, now, will you explain the goods purchased on January 28th—I mean, December 28th, January 3-6-10 and 25? How is that on the same bill?

A. What is that, now?

Q. Why are the goods shipped on the 28th, or purchased on the 28th of December, January 3-6-11 and 25 on that bill, if they were sent on the 28th?

A. Because I have explained to you we close our books on the 26th, and all purchases made from the 26th appear on your January bill.

Q. Is that the reason why goods purchased on January 3rd and 6th, for instance, were sent on December 28th?

A. No, they were actually purchased on these dates.

Q. They were purchased on those dates?

A. Yes, sir.

Q. How did you get that in the conditional contract, if all the goods under the conditional contract were sent on the 28th?

A. Because it was our understanding that every thing they might buy in the furnishing up of this place was to go on conditional contract.

Q. All that was got on the 28th of December—delivered on the 28th?

A. Except those few little items on the end there. I will explain that from here down there is a few dollars, don't you see, from there to there. Those were fill-in, don't you see?

Mr. HANEY: That is where they hadn't enough of something?

A. Yes, that is where they hadn't enough of something. If they were out a few yards of carpet,

they would have to come back and put in a few fill-ins, whatever they might be. If you will look back, there are fill-ins on shades. We didn't have enough shades. We went down and fixed up the shades there. For instance, a dozen—this is a dozen table tops. We didn't have enough tops. And they lacked a rug. They decided they would put the rug in. That rug was \$10. They were out of napkins. They sent down for \$18.75 on napkins.

Q. Going back to that item of 90 cents that was paid on the 27th day of December, and it is placed on the lease contract—that is the lease contract, isn't it?

A. Yes. 90 cents. I don't know what that is.

Q. Here is a bill of December 27th, one comb—four combs, 90 cents.

A. That is it, don't you see. That should have been on the open account.

Q. Should have been?

A. Yes, should have been on the open account.

Q. But it was on the lease account?

A. Yes, it got over there.

Mr. HANEY: Just explain how it got on the lease account. I don't think Mr. Teiser understands it.

A. We had two accounts with them—an open account. These are combs. We naturally wouldn't be entitled for combs, for sanitary reasons, nobody would ever expect to take those back. When this bill came up, their attention was called to it. Somebody paid the 90 cents—came up with the 90 cents. We found out that it, by an error, had been paged in this

account. When we say paged, we mean charged to that account. We had the 90 cents, we had the charge, so one offset the other. In this grand total of the amount sold on the contract, this 90 cents probably should be deducted. You see, in fact, one offsets the other.

Q. Did you transfer one from the lease account to the open account?

A. No, we didn't do it, because it was so easy, you see, to put it on there.

Mr. HANEY: Accomplished the same thing by giving them credit for 90 cents payment, didn't you?

A. Yes, sir.

Q. In other words, if they had come in and purchased those combs and it had gone through lease account, you saw it was to be paid for in cash, you couldn't stop the slip, it was easier to charge the amount and credit the account with the 90 cents?

A. Yes. Of course, it is such a trivial proposition—it should have probably been journalized, a book-keeper that was extremely careful, when they saw this charge coming, should have journalized it on the open account, and then when the money came put the money on the open account, where in truth it belonged. But this saved a journal entry.

Q. I will ask you, Mr. Kiernan, whether the goods that was purchased under the bill of December, dated December, amounting in all, without the credits being given, to \$1797.94—I will ask you to examine that and state whether that does not include

practically all of the fixtures that were gotten by that firm at that time, excepting a few odds and ends.

A. No. As a matter of fact, this whole merchandise was purchased prior to these dates, a considerable time prior, but we held the charges in the credit office—we would not O. K. them, you see. They don't appear on the bill until we actually O. K.'d the charge, and as they paid up, we would release. For instance, you will notice the carpets were released first, because they were anxious to get the carpets in.

Q. I am asking this: whether or not the December bill, or the bill marked December, 1912, amounting in all to \$1797.94, whether that didn't include practically all of the fixtures that were obtained by the Italian Restaurant, except things to fill in after the rest was obtained?

A. No, here is the rest of it here.

Q. Answer that Yes or No.

A. Why, no.

Q. It didn't. Now, that bill includes 150 chairs. That was practically all the chairs that they thought they would need, wasn't it?

A. I don't know as to that, Mr. Teiser. If there is any more chairs in here, they probably needed them.

Q. I mean, that they thought they would need at that time?

A. Yes.

Q. And it goes on with twelve tables, 380½ yards carpet, 3 bales lining, 16 yards padding, 1 door mat,

20 dozen teaspoons, 6 dozen dessert spoons, 1 dozen tablespoons, 20 dozen forks, 20 dozen knives, 2 oyster forks, 2 steak knives, 3 pair carvers, 27 sugar bowls, 3 meat carvers, etc. down the list in large quantities?

A. Yes, sir.

Q. Now, when you come to your January account, which is the account which we claim has no business going on that lease, it is one dozen table pads, 2 table cloths—

A. What date are you reading now?

Q. December 26th, the account of January. And 1 table pad, 5 dozen towels, 1 dozen towels, 1 table pad, 4½ yards of Velour—

A. Mr. Teiser, let me interrupt you. All that you are reading now was put in before the furniture, don't you see?

Q. Now, as a matter of fact, isn't all that was bought in January, or practically all that was bought in January—

A. Why don't you read on down?

Q. You interrupted me, Mr. Kiernan.

A. Read on down. On December 26th you will see comes the charge for \$650.

Q. That is what I was going to ask you. As a matter of fact, what was included in this January account was practically all decorations, or in a measure decorations, as a whole. I don't mean every article. For Velour, and for portieres, and for brass poles, and for sockets and for rings, for portieres and for Velour

again, and for labor, and for portieres, and for windows, and for Venetian shades, and for draperies, and for Venetian shades, and for treating walls and ceiling in oil by Passil & Fulton, \$650, etc. A pair of curtains and Venetian blind, and shades, and then four dozen spoons. And four rockers, 1 settee, 1 table, 2 chairs, 1 table and 3 rugs—that was for the dressing room, wasn't it?

A. Yes—I don't know.

Q. And 13 2-3 yards of carpet, 1 sweeper, 6 tablecloths, and cushions, etc., through the list?

A. Yes.

Q. Now, practically all of that was for decorations, wasn't it?

A. Yes.

Q. And not for fixtures?

A. Well, you see, this was all done at the same time.

Q. I understand, but I am just asking you the fact.

A. Yes, sure—decorations. You see, we gave the contract for the frescoing on the 27th day of November, but the charge was not put through until the 26th day of December.

Q. Did you expect to take a conditional contract on furniture for money expended in decorations, frescoing and painting walls, etc?

A. As additional security, yes. This is security. As a matter of fact, we could have just did like we did with this 90 cents comb, you see, just exactly as we did with the 90 cents worth of combs—we could

have opened up a regular account, and charged it with frescoing account, then put the \$650 on that, \$650 on the other; the one offset the other.

Q. The \$1500 which is set forth in your contract has been fully paid, hasn't it?

A. No, sir.

Q. Hasn't \$1500 been paid to you?

A. That depends upon how you are going to interpret it.

Q. There has been paid to Meier & Frank \$1500?

A. Yes, sir.

Q. And all of it has been applied to the lease account, hasn't it?

A. Yes, sir.

Q. You stated that some of the creditors called you up and asked you how you were selling these people?

A. Yes.

Q. What creditors called you up?

A. I remember Fleckenstein-Mayer called us up.

Q. Fleckenstein-Mayer called you up?

A. Yes. I remember other creditors, but I remember Fleckenstein-Mayer, because I remember I advised him to keep out of it.

Q. Fleckenstein-Mayer is another creditor, is it not?

A. I don't remember whether it is or not. If he followed my advice, he is not a creditor.

Q. What creditors called you up?

A. I remember the reporting agencies were calling up.

Q. But no other creditors who were selling these people goods called you up, did they?

A. I wouldn't say as to that. I don't know whether they were creditors or not, because I haven't seen the list of creditors. There was a great deal of calling up. Inasmuch as I was handling it, I said "Just tell them it is buying on contract. We don't know anything about it."

Q. What advice did you give Fleckenstein-Mayer?

A. To keep out of it. I don't know whether, I knew Montrezza was there—his credit is such that he couldn't get ten cents practically; therefore, I didn't go much on his being secretary of an organization expecting to get very much out of it.

Q. As a matter of fact, what was the reason you got Mr. Everett and Mr. Pearson to guarantee this contract?

A. Because, you see, the bulk of the goods sold here are materials that, if we have to take back and sell the second-hand man, because we cannot take any old goods back in our store—whatever we pull goods, as we say among credit men, which we don't do very often, because our credit is higher grade, we send them to the second-hand man. Old goods never come back to our store. These goods, if we had to take them back, they would amount to very little.

Q. Why did you feel it necessary to have Mr. Pearson and Mr. Everett—I presume Mr. Pearson's credit is good?

A| Yes.

Q. Mr. Everett's is good?

A. Yes.

Q. Why did you deem it necessary to have Mr. Pearson and Mr. Everett—in addition, rather, to Mr. Pearson's and Mr. Everett's guarantee, why did you deem it necessary to have a sales contract with them, or conditional sales contract?

A. It was necessary because they were buying, don't you see, they kept buying material which would gradually depreciate in value.

Q. Well, wasn't Mr. Pearson's credit good?

A. Yes, it was.

Q. What was the occasion for a conditional sales contract?

A. Because we wouldn't O. K. the stuff unless he signed it.

Q. After he did sign it, what was the occasion for a conditional sales agreement?

A. Because that was necessary. We wouldn't let even Mr. Pearson—

COURT: You wanted to have all you could get as security, I presume?

A. Yes, sir. Just like taking a note. All the indorsements on it are valuable. Mr. Pearson, before he would buy \$3200 from me, would have to make some arrangements for protection, because that is a whole lot of money to sell a person on open account.

Q. When this agreement was signed, Mr. Kieran, there wasn't any memorandum attached to it, was there?

A. You mean these bills?

Q. Yes, any memorandum at all?

A. Oh, no, these bills—couldn't do it, because, you see, we couldn't get the sales-checks out.

Q. Was there any memorandum of any kind except this one contract that was signed?

A. That was all.

Redirect Examination.

Q. This contract of lease is dated the 26th day of November?

A. Yes, sir.

Q. And about all these goods, nearly all of them, were delivered about the 28th day of December?

A. All within two days.

COURT: That is more than one month after this contract was signed.

A. Yes, your Honor, because they were engaged in cleaning up.

Q. They did all the frescoing between that time?

A. Yes. They might have hung a few curtains. But you see in our store a man cannot cut out—he cannot cut this expensive Velour for curtains unless the credit office O. K.'s the charge. So while the charges might have been O. K.'d, the goods were not delivered till some time afterwards.

Examination by the Court.

Q. Mr. Kiernan there has been brought out here, this contract was signed on the 26th day of November, and this contract says you have sold goods “de-

scribed in the list hereto attached and marked Exhibit A." Was that list ever attached to this contract?

A. Yes, they are always.

Q. Which is the list?

A. It becomes a copy of our bills. Every contract, there is an original bill goes to the customer—sometimes you get your bill on the first of the month; then there is a duplicate which goes in a binder, which are kept there, which are permanent records of the store, and a triplicate goes on here.

Q. Was that list attached with the concurrence and consent of the buyer?

A. Of the people signing it, yes, because a great many people say, for instance, sometimes we leave this blank, and they say "Well, now, how about this figure?" "Well," we say, "We only ask you to pay for what is afterwards attached," you see, to their bill.

Q. That leaves it with the seller to fix his own Exhibit A, and attach it thereto, and thereby it is made part of the contract?

A. He understands, your Honor, that is just going to be a duplicate of his purchases.

Q. Well, that is outside of the contract, so far as his understanding and yours might be with regard to attaching the "Exhibit A." Now, that "Exhibit A" was not really attached when that contract was drawn and signed?

A. No, it is impossible to get it. It would be impossible, don't you see, because he would not know

how much it was going to cost.

Q. Well, are those contracts drawn up beforehand in anticipation of running a bill at your store?

A. Yes. Not running a bill, but to include a certain amount, or include the fitting up of a place.

Q. Well, now, I understand here that the purchaser has traded on this contract to the extent of \$3213?

A. Yes, sir.

Q. And the consideration of the contract is \$1500, and the contract provides that \$1500 shall be sold; that is, goods shall be sold, and that for those goods the purchaser shall pay \$1500. Now, that marks the extent of your contract?

A. Maybe I haven't made myself clear. You see, when he came up on the 26th of November, at that time we were only going to sell him but a few articles. Among others was the \$650. And he paid \$750. This was to be the first part.

Q. \$650 was the work of frescoing?

A. Yes.

Q. That was not an article out of your store at all?

A. No.

Q. But you have it down there as though you had sold him the \$650 frescoing?

A. Yes, sir.

Q. And you charge that on the bill, and that has gone into the items which you say have been attached as the risk of that contract. Well, now, let us get back here again. Under that contract, now, you have

sold him altogether, according to this statement, \$3213 worth of goods, including the frescoing?

A. Yes, sir.

Q. And he has paid you divers amounts. How much has he paid you altogether?

A. He has made three payments of \$100 each.

Q. How much has he paid you on that account altogether?

A. You see—

Q. Answer my question.

A. The whole amount?

Q. Yes.

A. \$1564.60.

Q. He has paid that on that account?

A. Yes.

Q. Well, now, what were you going to answer to that?

A. He came up—the original contract, that is, when he spoke of it first, \$650 would leave a balance of \$100, and then he purchased six hundred and this amount—\$624.

Q. \$624. That is not the first item. \$412 is the first item.

A. That was the purchase, however, for the sales checks didn't come through. They had to measure up the carpets—we estimated.

Q. You have \$412 charged?

A. These charges came through first. We took care of those. You see it takes a little time to go down there and measure up the carpet and lay it and line it.

and the chairs, don't you see, was easily put through and charged. They were the first thing we took care of. This item here of \$250—

Q. That is a payment?

A. Yes, that is a payment. This took in this item—this one and that one.

Q. Which—\$750?

A. Yes.

Q. I thought you said—

A. No, the difference, the \$100 and the \$250.

Q. Paid it out on the first item and the second item?

A. Yes. You see, he kept paying more money, we kept O. K.'ing more goods, because that was on our contract: one-third down for furniture and one-third down for cut material.

Q. According to your idea, this contract could have gone on, and he might have paid all this up except \$150, and then bought some more goods?

A. Yes, sir.

Q. And it would all apply on this contract?

A. Yes, sir, that is done, and it is done this way frequently. We have the Chesterbury Apartment, for instance. I think they owe us now \$6,000. The original contract was \$5,000, and they paid up, I believe, something like within about \$1,000. Now then, we sold them \$3,000 worth more. We added that on the ledger: just go on adding that down, don't you see; kept it on the original paper.

Q. Running month by month and year by year?

A. Running month by month and year by year on the original paper. That is not the only one. That is done on three—well, I might say, it is done on one-third of our contracts.

Q. It seems to me you are bordering on dangerous grounds in trading that way, especially when the stocks go into bankruptcy.

A. That is the way we have been doing, your Honor. And other stores do the same. You see, a young married couple will come in, they will say they want to get a dining room set. It may be \$60, and we will take \$20 down, and they pay all up to \$10. Then they say "We want an extra bedroom set." We won't even ask them to make a payment down. We will charge under the original contract.

Q. It seems to me the contract is all right, if you attach a list to the contract so you can identify those goods, and you can hold them as far as that goes; but when those goods are paid for, and then you sell other goods and undertake to apply it on that contract—

A. It is in our opinion we still hold title to it, and in the opinion of the majority of the purchasers we still hold title, because they say "Why should you be afraid? You have got \$200 on my property here as security." When we try to get some more money out of them, they say I have got \$200; that is security for it; when we try to get some money down on some different purchases. We have contracts there that have been running ever since we entered the contract

department.

Q. That might be true, and not make them legal.

A. Of course, that is for the courts to determine; not we. We are willing to sell the merchandise. At the same time, if we cannot do this, why, then, we are not going to do it any longer.

Q. Of course, you ought to know whether you are on safe ground.

A. We pay our attorneys enough. If they don't do, we pay somebody else. That was my intention—I was the only one in the store talked about it. It was the intention of Mr. Everett and the intention of Mr. Pearson.

(Excused.)

Adjourned until 10 A. M.

Portland, Oregon, October 4, 1913.

A. E. GEBHARDT, called as a witness on behalf of the trustee, being first duly sworn, testified as follows.

### Direct Examination.

Questions by Mr. TEISER:

Mr. Gebhardt, what connection did you have in reference to the bankruptcy matter of the Italian Restaurant Company, a corporation?

A. I represented several of the creditors that had claims against the corporation.

Q. You were the attorney for the petitioning creditors, were you not?

A. Yes, sir.

Q. Were you present at a hearing on or about the

14th day of July, 1913, at the Referee in Bankruptcy's office, Mr. Chester G. Murphy, at the time when the question of the validity of the claim of Meier & Frank to certain property was in question?

A. I do not recall the exact date, but it was about the middle of July that a meeting was held at his office, and I was present at that meeting, and this question came up.

Q. Will you state as to whether or not there was any stipulation or agreement that a claim should be filed, or any conversation or anything else that occurred in reference to a claim being filed, of Meier & Frank against the trustee, for the recovery of these particular goods which are in controversy?

A. Well, to the best of my recollection, there was some discussion as to the filing of a claim by Meier & Frank. I understood that they had a contract for the furnishing of dishes and linen and things of that kind, and that that contract—I think Mr. Joseph claimed that that contract had not been met, and that the goods belonged to Meier & Frank; and the question of filing a claim came up, and I left the meeting with the impression that an agreement had been reached that the claim should be filed.

Q. Well, was that impression the result of anything actively said at the meeting?

A. According to my recollection, after some talk, Mr. Murphy said something to this effect: I don't pretend to recall his exact words, but he said something to this effect: "Well, we will consider the claim

filed, then." And Mr. Joseph said "Yes"—something of that kind. I couldn't recall the exact words that were used, because I was simply there looking out for the interests of my clients.

Q. Was there a formal presentation of the claim of Meier & Frank and of the trustee at that meeting?

A. I didn't see any, no, sir; that is, no paper was handed in that I could see, excepting the—

Q. I don't mean that; but was the matter fully gone into at that meeting as to the validity of that claim?

A. Yes, there was a good deal of discussion about it at the time.

#### Cross Examination.

#### Questions by Mr. HANEY:

Q. You say you have the impression that Murphy said, "We will consider this claim as filed?"

A. Yes, sir.

Q. And that Mr. Joseph acquiesced in it?

A. Yes.

Q. Do you remember having any impression as to what Mr. Joseph said about it?

A. Why, Mr. Joseph at first seemed to have some reluctance about filing the claim, or about presenting this contract; and now I cannot recall, of course, just the words that passed between Mr. Teiser, Mr. Murphy and Mr. Joseph, but finally Mr. Joseph said, "Well, then, we will agree to that."

Q. We will agree to what?

A. That the claim shall be considered as filed. That was the question that came up.

Q. Did you hear any discussion between Mr. Murphy and Mr. Joseph about bringing a suit or action of some kind for recovery? Do you have any recollection of that?

A. I think that Mr. Joseph said that he would bring a suit later; that if any suit was brought, he would try that question later.

Q. And what was Mr. Murphy's reply, do you know?

A. No, I don't recollect.

(Excused.)

GRACE ARNOLD, called as a witness on behalf of the trustee, being first duly sworn, testified as follows.

#### Direct Examination.

#### Questions by Mr. TEISER:

Miss Arnold, your occupation is that of a stenographer? Public stenographer?

A. Yes.

Q. Did you take the testimony before Chester G. Murphy, Referee in Bankruptcy, in the matter of the Italian Restaurant Company, in reference to a claim of Meier & Frank to certain property claimed by them,, which was held by the trustee, on or about the 14th day of July, 1913?

A. Yes, I did.

Q. Have you your notes of that testimony?

A. Yes.

Q. Your shorthand notes?

A. Yes, I have.

Q. Will you turn to your notes, and state whether or not any stipulation of any kind, or any memorandum of any kind, was attempted to be dictated to you in that proceeding, other than what is set forth in this testimony which I hand you?

A. No, there was not.

Q. There was testimony to the effect that at the beginning of the proceeding I, as attorney for the trustee, attempted to dictate something which would appear to make the matter a more formal matter than appears in the testimony as taken, and that Mr. Joseph objected to it, and that after the objection the matter was not proceeded with in that regard. If such a condition existed, would you have taken it down, if I started to dictate something?

A. Well, if you had started to dictate it to me, I would have taken it down.

Q. And if you had started to take it down, your notebook would show it?

A. My notebook would certainly show it, yes.

Q. Will you refer to your notebook, and see whether anything is scratched out, or anything relating to the proceeding except what is stated in the transcript of the testimony?

A. No, there isn't anything here except what is written up in the transcript.

Q. I will ask you to identify this testimony which

I now hand you, to which I have referred.

COURT: Did you make that transcript?

A. Yes, I made it.

COURT: I think that is identification enough.

A. It is just the same, Mr. Teiser.

Mr. TEISER: I will ask that it be filed as one of the trustee's exhibits.

Received and marked "Trustee's Exhibit C."

### Cross Examination.

Questions by Mr. HANEY:

Miss Arnold, did you hear any conversation there concerning the filing of a claim by the Meier & Frank Company?

A. Well, I don't distinctly remember. Of course, I heard everything that was said, but I don't remember. I hear so many little things.

Q. That record shows all of the record that was made there at that time, doesn't it?

A. All of the record that was made, yes.

Q. You know Mr. Joseph, do you?

A. Yes. There is Mr. Joseph there.

Q. Do you recall hearing any conversation between himself and Mr. Murphy concerning the filing of a claim by Meier & Frank Company?

A. I really don't recall it, no.

Q. If there had been any conversation wherein there had been a verbal agreement between them that the claim should be considered as filed, you would have taken it down, would you not?

A. Not necessarily.

Q. Well, you took everything down that was connected with the hearing, did you not, except that?

A. I took all the testimony. Sometimes they talk things over there, over there in the bankruptcy court, that I don't report.

Q. You don't report all that is said, then?

A. No, I don't.

(Excused.)

GEORGE W. JOSEPH, called as a witness on behalf of the claimant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. HANEY:

Mr. Joseph, you were an attorney representing somebody at a meeting in Murphy's office about the 14th of July last?

A. Yes.

Q. Just detail to the judge the circumstances under which you went there, and what happened after you got there.

A. I represented, of course, Meier & Frank Company in going there. There had been repeated demands for us to appear before the referee down there concerning this property. We had made demand on the trustee for this property, claimed it was conditionally sold or leased to the bankrupts. And after being requested to go several times, we went down there on the day that was set for the examination of

the bankrupt, as I remember it, and we went down there for the purpose of making known our claim to the referee, under oath, if he desired to know about it, and also to the trustee. We went down there—

Q. When you say “we,” who went with you?

A. Mr. Kiernan. And Mr. Kiernan was the only person I took down, because he was familiar with all the facts and circumstances, and all I wanted Mr. Murphy, the referee, to know was that our claim was absolutely in good faith, and virtually to make a further demand upon the trustee for this property. I wanted a witness there who could fully explain the circumstances, which was the only object in going there. No claim had ever been filed, and we didn't intend to file any claim in that court for this property, any written claim. But we had demanded it of the trustee. We met there, and Mr. Murphy came in in a few minutes, and Mr. Teiser was there representing the trustee, and Mr. Murphy announced that I was there representing the Meier & Frank Company, and might hear what our claim was. So I said, “All right. We will have Mr. Kiernan explain that to you.” And he administered an oath to Mr. Kiernan, and proceeded to take down the testimony. Now, just before they started to take the testimony, Mr. Teiser was fidgeting around there, and he started to dictate something. And I made the remark—he was going to dictate a formal proposition to the stenographer, so and so appearing for so and so. I says, “This is an informal hearing. We are simply here to

let you know what our claim is." Mr. Murphy coincided in that, and went right ahead with the examination. I produced the bill of sale, or the conditional sale, or the lease, and Mr. Murphy looked it over; and then the question was asked as to the amount of the purchase-price or the lease price, for the absolute owner of the property. And it appeared that it was more, pretty near twice as much as was mentioned in the lease. And as soon as we reached that point, Mr. Murphy said that he didn't believe it could be varied by oral testimony. After some little talk, I says, "If you take that view of it, there is no need of going any further. You know what our claim is, and," I says, "I will proceed to replevin the property." And he says, "I will give you the right now to sue in any court." Mr. Teiser now spoke up and said they had to sue in the United States Court. I didn't know that at the time, that we would be compelled to go into the United States Court to recover that property from the trustee, and I don't know if that is true yet. But Mr. Teiser said, "Well, they have to go to the United States Court," to Mr. Murphy. Mr. Murphy says, "I will give them the right to sue in any court wherever they please." There was no formal order entered in our presence, and no order made. We went away, and they simply went ahead with the proceeding set for that time, which was the examination of the bankrupt—the officers of the bankrupt.

Q. There has been some testimony introduced, Mr. Joseph, to the effect that you agreed with Mr.

Murphy verbally that the claim might be considered as filed, and the testimony heard under those circumstances?

A. There was no such agreement. Now, Mr. Murphy has a large amount of business down there, and he is simply mistaken about that fact, because I never stipulated to anything about a claim being filed, because we never intended to file any claim there. We were going to recover this from the referee in case our demand for the possession of it was not honored.

Q. Do you know anything about the original sale that was made at the store?

A. No.

Q. You, personally, have no knowledge of that?

A. None.

### Cross Examination.

Questions by Mr. TEISER:

Mr. Joseph, you say that Mr. Murphy at that meeting called a witness Mr. Kiernan?

A. I says, "We have Mr. Kiernan here, He will explain the circumstances to you."

Q. And he was put on the stand?

A. Yes.

Q. And then you said I began to dictate some formal statement?

A. Well, you kind of fidged around there a minute, and wanted to make it a formal matter, you see, and I said No.

Q. What do you mean by fidged around?

A. You kind of moved around from one place to another, and started to dictate something to the stenographer.

Q. Yes, I started to dictate something to the stenographer?

A. Yes, and it was called off, that proposition.

Q. And you suggested to me or to Mr. Murphy that that was not a formal proceeding?

A. I says, "This is simply an informal proposition here. We are here to explain the circumstances of this contract to you; nothing more."

Q. And the stenographer struck that off her minutes, I suppose?

A. Whatever there was taken down there—she started, and that is all. As soon as you started to dictate something, I knew what you were going to do, I presumed so, and simply objected to it.

Q. Your firm is attorney for the Meier & Frank Company in this proceeding, is it not?

A. Yes, I stated that.

(Excused.)

**[Oral Decision of Court.]**

COURT: This contract purports to be in writing. It is a contract by the terms of which the Meier & Frank Company agrees to sell certain goods, and the consideration of that sale is \$1500. Ordinarily, the consideration can be varied in a contract of sale, or in a deed, but this \$1500 seems to have been couched in the contract for the purpose of indicating the real

value of the purchase, the real consideration that was agreed upon there. There is another thing about this contract. It purports to have attached to it and marked "Exhibit A" a list of the property. It says. "The seller hereby promises and agree to sell and transfer unto the purchaser all of the personal property described in the list hereto attached and marked 'Exhibit A.' " Now, if there had been a list attached and marked "Exhibit A," the list would make this contract definite and certain. It doesn't appear to me that this can be a definite and certain contract until such a thing is done. And it developed by the testimony of Mr. Kiernan yesterday that it was not really the intention of the parties to attach a particular list to this contract; but the sellers depended more, and entirely, I might say, upon their book account in the store, and when they got through with that, they concluded that that was a part of this contract, and it is not attached and never has been; so that there never has been a completed written contract as to this sale of goods.

Contracts for the sale of real property are required to be in writing, and contracts for the sale of personal property, where the amount of the sale is over a certain amount, which I don't remember without referring to the statute now, there must be a payment of \$50 in order to make the sale good. I don't know that that has any real bearing upon the question here. But in the course of the testimony of Mr. Kiernan he speaks of this contract as a lease, for the purpose of

retaining a lien on these goods for the purchase-price, and with the right to retake the goods and also claim the title afterwards, because it is claimed the title never passed to the purchaser. According to the theory of Meier & Frank as to the use of this contract, they could sell from time to time, and keep open a running account from month to month or from year to year, as I inquired of the witness, and whatever they sold hereafter, whatever time it might be sold, this contract would take effect on that property and hold it, and there would be no absolute sale, or at least it would only be a conditional sale for all purchases made which Meier & Frank desired to be affected by this contract.

Now, it has been argued that this contract, notwithstanding it was not made perfect, would be aided by verbal testimony; or, in other words, that a conditional sale might be consummated through oral testimony. I think the vice of that argument is that the parties have attempted to show a conditional sale under a written contract, and in attempting to do that, it is shown very plainly and convincingly that the written contract never was completed, because there never was any "Exhibit A" attached to it, and goods sold under this contract have never been identified according to the contract. While this contract, and what verbal contract might have been made as to additional goods, possibly might be good as between the parties, yet when outside parties have been permitted to deal with apparent owners of these goods, with-

out knowledge of the fact that the person is not the owner, and with the belief that he is the owner of the property, when he has gone into bankruptcy, the creditors take as bona fide purchasers of that property, and it does not seem to me that it is just and equitable to the creditors in this case that they should be made to suffer by reason of a sale that is a pretended sale, that has never been consummated, and with a verbal understanding that Messrs. Meier & Frank should retain the title to this property, or, in other words, that they should retain a continuing lien upon whatever property is sold to apply upon account.

I think, under the circumstances and conditions of this case, that the court will declare that Messrs. Meier & Frank are not the owners of this property as against the trustee, and that the decree will be that the title be confirmed and settled in the trustee.

As to the other point, I do not think the record or the testimony shows sufficient upon which to determine that there has been a *res adjudicata* in this case.

I will say, in further illustration of what I have said, this written contract was drawn up and signed on November 26th, and it purports to have attached to it the "Exhibit A" which would identify it properly. But instead of that, here is the account which runs in December and January, covering both months, and a little bit in February, not a very large amount; and that entire account runs up to \$3200. The only con-

sideration named was \$1500, and more than that has been paid on this account, so we may say that the contract for the purchase-price as fixed by the written contract has been paid and discharged, and so far as the other is concerned, it must stand entirely upon the verbal account, or not have any standing at all. But I don't think that you can supplement a written account by a verbal account in that way so as to hold the conditional sale.

Now, there is part of this sum, six hundred dollars and more, that was not really a sale at all, but that Messrs. Meier & Frank assumed the payment of the cost price of doing the work. Still at the same time the parties are claiming a lien, according to Mr. Kiernan, upon the frescoing that was in the room itself.

Mr. HANEY: If you will permit me to interrupt, I don't think Mr. Kiernan meant to testify to anything of that kind.

COURT: That is the impression I drew from what he said.

Mr. HANEY: I think you must have misunderstood him. He certainly didn't claim there was any lieu upon that frescoing. I think that was made clear by other questions. I think your Honor is mistaken. I haven't got that impression.

COURT: That aside, I don't think there is sufficient anyway, so the court will decree as I indicated before.

Mr. TEISER: I understand this is a suit in equity, and that all the relief ought to be given in this suit.

That is my contention, at any rate. Now, unquestionably, or probably there is going to be a loss resulting from the delay in the sale of this property caused by Meier & Frank, and I would ask your Honor whether or not it would be proper in drawing this decree to leave the case open for a later ascertainment in this particular case as to the damage which was caused, so the decree may be further drawn.

COURT: My view on that proposition is that Messrs. Meier & Frank had a colorable right, colorable title, and they were pursuing that in good faith, and if they happened to be wrong and there was delay in this matter, I don't think there ought to be any damages.

Mr. TEISER: I will abide by your Honor's views in the matter.

Mr. HANEY: I don't know what the rules of the court provide for, for the purpose of appeal. I would like to give notice of appeal now in open court. If I find it is necessary to give it in writing, I will do so later.

[Endorsed]: Filed Oct. 18, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

[Trustee's Ex. A.]

L 2280

# AGREEMENT

Portland, Oregon, .....191.....

Purchaser .....

Address .....

.....

Occupation .....

Resided in City .....

Former Residence .....

Terms .....

.....

.....

Remarks .....

.....

.....

.....

This certifies that Meier & Frank Company, a corporation as seller and Italian Restaurant Company, a corporation as purchaser, have entered into a contract, as follows, to-wit:

In Consideration of the payment to it of the sum of Fifteen Hundred (\$1500.00) by purchaser as hereinafter provided, the seller hereby promises and agrees to sell and transfer unto the purchaser all of the personal property described in the list hereto attached and marked "Exhibit A," which is hereby made a part hereof.

The purchaser hereby promises and agrees to pay the said sum of Fifteen Hundred Dollars (\$1500.00) as follows: \$750 Dollars upon the execution and delivery of this contract, receipt of which is hereby acknowledged, and the balance in monthly payments of one hundred Dollars each, one of said installments

to be paid on the 5th day of each and every month hereafter until the whole amount above mentioned shall have been paid.

Deferred payments shall bear interest at the rate of 6 per cent per annum payable monthly.

It is understood and agreed by and between the seller and purchaser herein that the purchaser shall have the possession of said property from the date of this agreement; but that time is the essence of this contract, and that if said purchaser shall sell, dispose of, or encumber, or attempt to sell, dispose of, or encumber said property or any part thereof, or shall remove, or attempt to remove same, or any part thereof from the premises numbered Third and Alder Street, in the city of Portland, Multnomah County, State of Oregon, without the written consent of the seller, or if the said purchaser shall fail to make any or either of the payments above specified or if said property, or any part thereof, shall be attached or levied upon, or if said purchaser shall fail to secure insurance as hereinafter provided, then and in either of such cases, the seller herein may take immediate possession of said property, wherever the same may be found.

The purchaser herein promises and agrees to have said property insured at his or her expense for a sum not less than \$1500.00 Dollars, in a responsible insurance company, satisfactory to the seller, with loss, if any payable to said seller, as its interest may appear, and to deliver the policy therefor to the seller and it is also understood and agreed that destruction of or

damage to said property by fire or otherwise shall not relieve the purchaser from payment therefor.

It is expressly understood and agreed that the title to said property shall remain in the seller until each and all of the payments hereinbefore mentioned shall have been made by such purchaser, and that if at any time said seller shall take possession of said property as hereinbefore providing, then in such event any amount or amounts of money paid by said purchaser, under this agreement, on said property, shall be considered as payment for the use of said property by the purchaser, and the purchaser shall have no claim against the seller on account thereof, and in case any action or proceeding at law is instituted by the seller herein to secure the possession of said property, or any part thereof, or to collect any amount becoming due hereunder, then and in such event the purchaser herein promises and agrees to pay such sum as the Court may adjudge reasonable as attorney's fees in such action or proceeding.

In Witness Whereof, the parties hereto have executed this agreement, at Portland, Oregon, this 26th day of November, 1912.

(Seal)

Meier & Frank Company,

By J. L. Meier.

Payment guaranteed by:

(Seal)

C. V. Everett,

Italian Restaurant Co.

416 B. of Trade

M. G. Montrezza,

Secretary.

C. V. Everett,

President.

Payment guaranteed T. Pearson.

March 1913

L|2280

Italian Sestaurant

Third &amp; Alder Sts

City

Mar

4907	1	4	Yds Carpet	50	2 00
------	---	---	------------	----	------

4907		35	1-3 Yds. Carpet	50	17 67
------	--	----	-----------------	----	-------

L|2280

January 1913

Italian Restaurant

S E Cor 3rd &amp; Alder Sts

City

Dec

1311	27	1	Comb	35	
		1	"	25	
		2	"	15	30 90

—

January 1913.

Italian Restaurant,

S. E. Cor. 3rd &amp; Alder Sts.

City.

Jan

901	2		Allowance on 2 Dz Knives	1 50
2000	11	1	Dz Table Tops	9 60
4907	25	1	Rug	10 00
2000		5	Doz Napkins	3 75 18 75

January 1913

L|2280

Italian Restaurant,

S. E. Cor. 3rd &amp; Alder Sts.

City.

	Dec		Forward			1058 80
6305	27	4	Rockers	)		
		1	Settee	)		
		1	Table	)		
		2	Chairs	)		
		1	Table	)		123 00
4907	3		Rugs	for	4 00	
	1		W Rug		5 00	9 00
<hr/>						
4907		13-2	3 Yds V Carpet	2 00	27 34	
		20	S Pads	25	5 00	
		1	Sweeper		5 25	37 59
<hr/>						
542		1	Cabinet			4 50
2000	28	6	Table Cloths	2 25	13 50	
		3	" Pads	1 25	3 75	17 25
<hr/>						
2000		1/2	Dz C Sacks	1 20	60	
		6	Dz Towels	35	2 10	2 70
<hr/>						
4712		3	Cushions as per Agreement			15 00
4907		24 1/4	Yds Linoleum	1 80		43 65
<hr/>						
Jan						
4907	3	10	Yds Canvas	65		6 50
4712	6	1	Venetian Shade for	)		
			Stair Landing	)		12 50
						L 2280

January 1913.

Italian Restaurant,

S. E. Cor. 3rd &amp; Alder Sts.

City.

Dec

2000	26 1	Dz Table Pads			9 00
2000	2	Table Cloths	2 25	4 50	
	1	Table Pads		1 50	
	5	Dz Towels	1 40	7 00	
	1	" "		3 00	
	1	Table Pad		1 15	17 15
<hr/>					
4712	4½	Yds Velour	1 85	8 33	
		Labor Making 1 Single			
		Portier		1 50	
	7'	Brass Pole	20	1 40	
	2	Pr. Sockets	35	70	
	2½	Dz Rings	35	88	12 81
<hr/>					
4712	1	Pr Portiers as per			
		Estimate		25 00	
	12-5½	Yds Velour	1 85	23 75	
		Labor Making			
	1	Pr Portiers		2 75	51 50
<hr/>					
4712	8	Windows with V Shades &			
		Over-Drapes	28 95		231 60
4712	1	E Venetian Shade		14 87	
	1	E Pr Drapes		11 00	
	1	E Venetian Shade		14 87	40 74
<hr/>					

4712		Treating Walls & Ceiling in Oil by Passil & Fulton as Per Contract		650 00
4712	1	Pr Curtains Valance between as per Estimate	16 00	
	1	Venetian Blind as Per Estimate	12 50	28 50
7102	27	2 Shades to Order		2 10
901	4	Dz D Spoons .	3 85	15 40
Forward				1058 80

December 1912

Italian Restaurant

S E Cor 3rd & Alder Sts

City

Nov

6303	30	150 Chairs	For	412 50
------	----	------------	-----	--------

Dec

6310	7	12 Tables	4 00	48 00
4907	18	380½ Yds Carpet	1 55	589 78
	3	Bales Lining	7 00	21 00
	16	Yds Padding		4 00
	1	Door Matt	10 00	624 78
901	21	20 Doz Tea Spoons	2 19	43 80
	6	“ Desert Spoons	3 85	23 10
	1	“ Table Spoons		4 37
	20	Doz Forks	3 35	67 00
	20	“ Knives	3 35	67.00

	2	Oyster Forks	2 99	5 98	
	2	Steak Knives	3 00	6 00	
	3	Pr Carvers	1 60	4 80	
	27	Sugar Bowls	2 75	74 25	296 30
<hr/>					
901	3	Meat Covers	3 75	11 25	
	2	" "	4 75	9 50	
	1	" "		6 00	
	6	Soup Tureens	1 75	10 50	
	3	" "	2 21	6 63	
	6	Coffee Pots	2 34	14 04	
	2	" "	2 92	5 84	63 76
<hr/>					
2000	48	Table Cloths	1 05	50 40	
	48	" "	1 25	60 00	
	60	" Tops	80	48 00	
	60	" "	32	19 20	
	50	Doz Napkins	3 50	175 00	352 60

L 2280. Conditional Sale. From Meier & Frank Company to Italian Restaurant Co., Third and Alder. \$100.00 on 5th. Dated November 26th, 1912.

Filed Oct. 4, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

[Trustee's Ex. B.]

Re:  
Italian Restaurant Co  
Meier & Frank Co.

July 1, 1913.

Portland,

Oregon.

**Attention Credit Dept.**

Gentlemen:

The Trustee has completed an inventory of the property of the Italian Restaurant Co., and amongst the property inventoried by him as belonging to the estate are various goods sold to the Italian Restaurant Co. by your firm.

I understand that these goods are claimed by you under a conditional contract, but as it is very questionable whether the property can be held under your conditional contract, the Trustee is claiming the property and taking possession of the goods as the property of the estate. If, however, you desire to maintain your claim to the goods, I would suggest that you make a demand for them before the Referee without delay, so that the ownership of the same may be settled.

I have endeavored to see Mr. Joseph, your Attorney, at the suggestion of Mr. Kiernan, but have been unable to get in touch with him. I am accordingly sending him a copy of this letter.

Yours truly,

T|C

Sidney Teiser,

Atty. for Trustee.

c|c Mr. Joseph, Atty.

Filed Oct. 4, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

## [Trustee's Ex. C.]

*In the District Court of the United States for the  
District of Oregon.*

Testimony.

In the Matter of

ITALIAN RESTAURANT COMPANY,

A Bankrupt.

At a Court of Bankruptcy held July 14, 1913, at 3:30 o'clock P. M. before Chester G. Murphy, Referee in Bankruptcy, Fenton Building, Portland, Oregon, the following appearances were made:

Trustee by counsel, Mr. Sidney Teiser.

C. V. Everett, President of Clifford Investment Company, represented Clifford Investment Company, a creditor.

Creditors in person and by counsel, George W. Joseph.

Mr. A. E. Gebhardt represents petitioning creditors.

W. E. KIERNAN, sworn, testified as follows:

Questions by Mr. JOSEPH:

Q. What is your occupation?

A. Credit officer Meier & Frank Company.

Q. How long have you been there?

A. Two and a half years.

Q. Are you acquainted with the Italian Restaurant matter?

A. Yes, sir.

Q. Were you acquainted with the officers of the

company at the time the agreement was made concerning the purchase of some property?

A. Yes, sir.

Q. Have you a copy of the agreement which was entered into at that time?

A. I have the original.

Q. The original? All right, just offer that in evidence.

Thereupon original Conditional Sales agreement was offered in evidence and for identification marked

#### CREDITORS EXHIBIT A.

Q. Between whom were the negotiations had which lead up to the execution of the agreement?

A. Individuals?

Q. Yes.

A. Between Meier and Frank and Mr. Everett and Mr. Montreza, that is all.

Q. And who represented the Meier and Frank Company in those negotiations?

A. I did.

Q. What was the understanding or agreement?

A. When Mr. Everett came to me he wanted to—the original—he wanted to—us to furnish the decorations, and we talked then about the terms and his first agreement was, arrangement was to have \$1500.00, \$750.00 was to be cash.

Q. \$1500 credit?

A. Yes, credit. \$750.00 was to be cash, \$600 of that \$1500.00 was to be for the frescoing of the room

which was to be done by an outside contract. In other words of \$900.00 we got \$160.00 cash and the rest was to be paid \$100.00 a month.

Q. Do you mean to say they advanced some money at that time?

A. Meier and Frank did.

Q. How much?

A. \$600.00.

Q. To whom did they pay that money?

A. I don't know the name.

Q. They paid it to some third party?

A. We paid—charged to Meier and Frank—

Q. Paid this to a third party for the decorations?

A. Yes.

Q. In the Italian Restaurant?

A. We made no profit on that at all.

Q. Were you paid something on the account?

A. At that time yes, \$150.00 on the \$900.00.

Q. What were the total purchases under that account?

A. Afterwards it was, they wanted some goods, and we kept on asking for money, one fourth down, on November 26th they paid that, and on December 21 they bought more, purchased \$1041.00 and paid \$250.00 down, and they bought subsequent articles, when they paid \$1223.90.

Q. That all?

A. That \$1223.90 was the total amount paid before, at the time they made this purchase.

Q. Made before they made the purchases?

A. No, after they paid \$1223.90, there was no other purchase. That—

Q. What were the total purchases?

A. \$3129.33.

Q. What were the total payments?

A. Subsequent to this?

Q. The total payments.

A. \$1564.60.

Q. Were those purchases all on one account?

A. Yes.

Q. What account?

A. We had two accounts with them.

Q. I am asking you about this one account.

A. Contract account.

Q. How have you, them marked to distinguish?

A. All contracts marked "L" stands for lease.

Q. What number?

A. 2280.

Q. In addition to this account, do you have any other account?

A. We had an open account for them.

Q. Was that a conditional account?

A. No, open account.

Q. Were any of the goods which were purchased on lease account charged to open account?

A. No.

Q. Were all the goods purchased on lease accounts purchased conditionally?

A. They were.

Q. On what condition?

A. On the condition they were to pay \$100.00 a month.

Q. Under this contract?

A. Under this contract.

Q. You have inserted in here an approximate amount of \$1500.00, was it not a fact that the conditional sales, the items of the conditional sales, did not exceed \$1500.00 net value?

Mr. TEISER: I object to that question on the grounds that the written contract is the best evidence and any attempt to vary it by parole is improper.

Mr. MURPHY: The objection is well taken. I sustain the objection.

Mr. JOSEPH: Well, then, there is no need of us going any farther; we will merely have to commence an action—of course if you sustain the objection, that stops it.

Mr. MURPHY: I will have to sustain the objection. You are attempting to change the terms of a written contract. You say you sold them \$1500.00 worth of goods and admit you have been paid \$1500.00.

Mr. JOSEPH: At the time this contract was made, these goods were not here, and were purchased after November; it was understood these goods were attached to the contract.

A. Nine tenths of our contracts are done the same way.

Mr. JOSEPH: I don't think you could prove it in a court of bankruptcy, or any court. Not good

business.

A. Some of the goods were billed to Cappa, that was just for, I don't know—let's see that bill.

Mr. MURPHY: I would like some explanation.

A. That is just an error. I don't know how that was.

Mr. MURPHY: Who was D. L. Cappa?

A. You see, Mr. Murphy, there is a ledger number. A ledger number couldn't have two accounts for the same party.

Mr. JOSEPH: What was Mr. Cappa's position over there?

Mr. GEBHARDT: He was steward and manager of the Italian Restaurant.

Mr. MURPHY: I will sustain the objection.

(Witness excused.)

Filed Oct. 4, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 18 day of October, 1913, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

**[Petition for Appeal.]**

*In the District Court of the United States for the  
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate  
of Italian Restaurant Company, a corporation,  
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,  
Defendant.

The above named defendant, conceiving itself aggrieved by the order and decree herein made and entered on the 10th day of October, 1913, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

JOSEPH & HANEY,  
Attorneys for Defendant.

Dated, October 18th, 1913.

#### ORDER OF ALLOWANCE.

The foregoing appeal as prayed for, is allowed, and the bond on appeal, as security for costs, is fixed in the sum of \$500.00.

R. S. BEAN,  
District Judge.

Dated, Oct. 18, 1913.

[Endorsed]: Petition for Appeal and Order of Allowance. Filed Oct. 18, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 18 day of October,

1913, there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

**[Assignments of Error.]**

*In the District Court of the United States for the  
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate  
of Italian Restaurant Company, a corporation,  
Plaintiff,

vs.

MEIER & FRANK COMPANY, a corporation,  
Defendant.

And now on the 18th day of October, 1913, comes the said defendant, by Joseph & Haney, its attorneys, and says that the order and decree entered in said cause is erroneous and against the just rights of said defendant, for the following reasons

First: Because the evidence showed that the conditional contract of sale, or lease contract, between defendant and the Italian Restaurant Company, was indefinite and uncertain, so far as the written contract was concerned.

Second: Because the evidence showed clearly and distinctly, and was not impeached or discredited, that there had been a full and complete intent and understanding had between the parties to this contract, that all of the goods purchased from the defendant by the Italian Restaurant Company was to be under and by virtue of a conditional sale, title thereto to remain

in the defendant until full payment had been made.

Third: That in the face of its decision that there was no completed written contract as to the sale of these goods, the court erred in disregarding the oral proof as to the intent, meaning and understanding of the parties with regard to the effect of this sale, where the writing is indefinite and uncertain.

Fourth: Because the evidence showed that the sale of these goods amounted to and was in fact a conditional sale or lease contract, with title to said goods vested in defendant.

Fifth: That the court erred in holding and decreeing that there was no valid conditional sale, or lease contract, with respect to the goods in question.

Sixth: That the court erred in not holding and decreeing that the defendant was entitled to the possession of these goods, and in granting a decree for plaintiff, as prayed for by him.

WHEREFORE the said defendant prays that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of the defendant.

JOSEPH & HANEY,  
Attorneys for defendant.

[Endorsed]: Assignment of Errors. Filed Oct. 18, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 20 day of October, 1913, there was duly filed in said Court, a Bond

on Appeal, in words and figures as follows, to wit:

**[Bond on Appeal.]**

*In the District Court of the United States for the  
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate  
of Italian Restaurant Company, a corporation,  
vs.

MEIER & FRANK COMPANY, a corporation,

KNOW ALL MEN BY THESE PRESENTS:  
That we, Meier & Frank Co., Leon Hirsch and W. E. Kiernan are held and firmly bound unto R. L. Sabin, Trustee in Bankruptcy of the Estate of the Italian Restaurant Company, a corporation, in the sum of Five hundred dollars, to be paid to the said R. L. Sabin, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated October 20, 1913.

Whereas the above named Meier & Frank Company, a corporation, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit., to reverse the decree in the above entitled cause by the District Court of the United States for the District of Oregon.

Now, therefore, the condition of this obligation is such, that if the above named Meier & Frank Com-

pany, a corporation, shall prosecute said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of

MEIER & FRANK CO.

by J. L. Meier, V. P.

LEON HIRSH.

W. E. KIERNAN.

B. H. GOLDSTEIN.

Approved Oct. 20, 1913.

R. S. BEAN,

Judge.

[Endorsed]: Bond on Appeal. Filed Oct. 20, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 20 day of October, 1913, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

**[Citation on Appeal.]**

UNITED STATES OF AMERICA,

District of Oregon,—ss.

To R. L. Sabin, Trustee in Bankruptcy of the Estate of the Italian Restaurant Company, a corporation, plaintiff, and Sidney Teiser, his attorney, Greeting:

Whereas, Meier & Frank Company, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree ren-

dered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 20th day of October in the year of our Lord, one thousand, nine hundred and thirteen.

R. S. BEAN,  
Judge.

[Endorsed]: Citation on Appeal. Filed Oct. 20, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

State of Oregon,  
County of Multnomah—ss.

Due service of the within citation on appeal is hereby admitted in Multnomah county, Oregon, this ..... day of October, 1913, by receiving a copy thereof, duly certified to as such by B. E. Haney one of attorneys for defendant.

SIDNEY TEISER,  
Attorney for plaintiff.

And afterwards, to wit, on Tuesday, the 18 day of November, 1913, the same being the ..... Judicial day of the Regular November Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Transcript.]

*In the District Court of the United States for the  
District of Oregon.*

No. 6117

November 18, 1913.

R. L. SABIN, Trustee in Bankruptcy of the Estate  
of Italian Restaurant Company, a corporation,  
Plaintiff,

vs.

MEIER & FRANK COMPANY,

Now, at this day, for good cause shown, it is Ordered that defendant's time for filing the record and docketing the above entitled cause on the appeal, in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby, extended sixty (60) days from the date hereof.

CHAS. E. WOLVERTON,

Judge.

IN THE  
**United States Circuit Court  
of Appeals**

NINTH CIRCUIT

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**MEIER & FRANK COMPANY, a Corporation,**  
*Appellant,*

*vs.*

**R. L. SABIN, as Trustee in Bankruptcy of Italian  
Restaurant Co., a Corporation.**  
*Appellee.*

---

**Appeal from the District Court of the United States  
for the District of Oregon.**

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**Appellant's Brief.**

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**STATEMENT**

This is a bill in equity to determine the rights of the parties hereto in and to certain personalty in possession and custody of the appellee, as Trustee in Bankruptcy of the Italian Restaurant Co., a bankrupt.

The amended bill of complaint alleges that on

May 19th, 1913, a petition in involuntary bankruptcy was filed in this court against the Italian Restaurant Co.; that it was thereafter duly adjudged a bankrupt; that an order of reference therein was made to Chester G. Murphy, a Referee in Bankruptcy, and that on June 24th, 1913, at the first meeting of the creditors, the appellee, R. L. Sabin, was elected Trustee of said bankrupt's estate; that appellant Meier & Frank Co. filed a petition and claim for the recovery of certain personalty; that the Trustee objected to the allowance of said claim; that a hearing thereon was duly had, and that the Referee decided against the validity of said claim, and ordered said property to be held as the property of the Estate by the Trustee. That thereupon the Trustee offered said personalty for sale and the same was bid in by one J. T. Wilson, which bid was accepted and approved by the Referee. That notwithstanding the determination of the question of the ownership of said property, the appellant Meier & Frank Co. brought an action in the State Court against said J. T. Wilson for the recovery of said property. That by reason of said suit, the said J. T. Wilson refuses to receive the property. That the action of said Meier & Frank Co. has had the effect of depreciating the value of the property, and has created a cloud upon the title thereto. Wherefore this Trustee prays that this Court may determine the rights of the parties hereto in and to said property.

The answer of Meier & Frank Co. denies that it at any time filed a claim or petition with the Referee for the recovery of said personalty; denies that any hearing thereon was had; denies that the Referee decided against the validity of said claim, and further denies that the claim to said property by Meier & Frank Co. is or ever was adjudicated as between it and the Trustee in Bankruptcy. The answer also denies that the action against Wilson was brought after a determination of the question of ownership of said property by the Referee, but avers that no determination of the merits was ever had, and that the sale to Wilson had been confirmed. The answer further denies that the title to said property was ever in the Bankrupt or the Trustee of said Bankrupt's estate.

Upon the trial of this cause before Hon. C. E. Wolverton, District Judge, said Court held that there had not been a *res adjudicata* in this case, and that the rights of the parties in and to said personalty had not been determined before the Referee. The Court however held that Meier & Frank Company were not the owners of this property as against the Trustee, and a decree was thereupon entered confirming and settling the title thereto in said Trustee. From this decree, the appellant, Meier & Frank Company, has appealed to this Court.

Briefly, Judge Wolverton, in his decision, ruled that the written conditional sale covering this per-

sonalty, as an indication of the title thereto in said Meier & Frank Company was indefinite and uncertain, in that it did not have attached thereto, a full and complete list of the property to be covered thereby, and that therefore there was never a completed written contract as to the sale of this personalty. That while this contract, and what verbal contract might be made as to additional goods, possibly might be good as between the parties, yet it is void as against creditors in bankruptcy, who take as bone fide purchasers. That a written account cannot be supplemented by a verbal account as to affect said creditors, and that therefore title to said personalty is in the Trustee, as against the Meier & Frank Co.

In its assignments of error submitted by the appellant, the Meier & Frank Company, it is contended:

(1) That where a written conditional sale is indefinite and uncertain and where it is uncompleted, oral testimony is admissable to prove the intent, meaning and understanding of the parties with regard to the effect of such sale.

(2) That the evidence in this case showed clearly and distinctly, and was not impeached or discredited, that there had been a full and complete intent and understanding had between the parties to this contract, that all of the goods purchased under said contract from Meier & Frank Co. by the bankrupt, the Italian Restaurant Co., was to

be under and by virtue of a conditional sale, title thereto to remain in the Meier & Frank Co. until full payment had been made.

(3) That the evidence showed that the sale of these goods amounted to and was in fact a conditional sale, with title to said goods vested at all times in the Meier & Frank Company.

(4) That the court erred in holding and decreeing that there was no valid conditional sale with respect to these goods, and in holding and decreeing that the Meier & Frank Company was not entitled to the possession of these goods.

## POINTS AND AUTHORITIES.

### I.

A "conditional contract of sale" is a contract for the sale of property, real or personal, in which the transfer of title to the property sold to the purchaser, or his retention of it, is made dependent upon the performance of some condition. No title passes until such condition is performed. As to whether the sale is absolute or conditional depends upon the intention of the parties to the contract.

Isaacs on Conditional Sales in Bankruptcy,  
P. 1.

No particular form of instrument is necessary to create a conditional sale. It may be in the form of a lease or note. It has indeed been held that no express declaration as to the reservation of title is

necessary, but that reservation may be implied and that it is really the intent of the parties that must govern.

35 Cyc. 662.

Rodgers vs. Bachman, 42 Pac. 448.

The contract under which these goods were delivered was one of conditional sale.

Singer Mfg. Co. v. Graham, 8 Ore. 17.

McDaniel v. Chiarmonte, 61 Ore. 406.

Harkness v. Russell, 118 U. S. 663.

Bierce v. Hutchins, 205 U. S. 340.

Bryant v. Swofford Bros., 214 U. S. 279.

## II.

In an action in a Federal Court, the construction and validity of a conditional sale will be determined by the local laws of the State.

35 Cyc. 666.

Loveland on Bankruptcy, 4th Ed. p. 837.

In re Tice, 139 Fed. 52.

York Mfg. Co. v. Cassell, 201 U. S. 352.

Bryant v. Swofford Bros., 214 U. S. 379.

Hewit v. Berlin Mach. Works, 194 U. S. 296.

## III.

In the absence of statute, a conditional sale to be valid need not be reduced to writing, or recorded.

35 Cyc. 663.

Blackwell v. Walker, 5 Fed. 419.

Benner v. Puffer, 114 Mass. 376.

Parker v. Payne, 48 So. Rep. 835.

#### IV.

In the State of Oregon, an oral conditional sale is valid as to all the world. The statute only requires such contracts to be in writing and recorded, where they cover **fixtures** so attached to **real estate** as to become a fixture thereto. Other than this exception, no conditional sale of personalty is necessary to be in writing or recorded, in order to be valid.

Sec. 7414 L. O. L.

Singer Mfg. Co. v. Graham, 8 Ore. 17.

#### V.

A contract for the sale of personalty is none the less a conditional sale, because it is to include after acquired property or goods not in existence at the time of the execution of such contract, provided the goods were thereafter delivered and accepted under said contract. The parties can stipulate as they see fit as to the nature and construction of such agreement.

Bierce v. Hutchins, 205 U. S. 340.

Benner v. Puffer, 114 Mass. 376.

Collerd v. Tully, 77 At. Rep. 1080.

Stoll v. Sibson, 56 At. Rep. 710.

Cumberland Nat. Bank v. Baker, 40 At. Rep. 853.

#### VI.

The Trustee in Bankruptcy now takes the

estate of the bankrupt, clothed with the rights, remedies and powers of a lien creditor and a judgment creditor.

Bankruptcy Act of 1898, Sec. 47-a, as amended by the Act of June 25, 1910, Sec. 8.

Loveland on Bankruptcy, 4th Ed. P. 767.

Whether property in the possession of a bankrupt under a conditional sale, by which the title is reserved by the vendor until the property is paid for passes to the trustee, depends upon whether the arrangement with regard to such property is valid under the law of the state in which sale is made as against a creditor holding a lien by legal or equitable proceedings thereon.

Loveland on Bankruptcy, 4th Ed. P. 837.

In re Franklin Lbr. Co., 187 Fed. 281.

If the arrangement between the vendor and the vendee is valid under the state law as to such lien creditors, it will be sustained in bankruptcy.

Loveland on Bankruptcy, 4th Ed. P. 839.

## VII.

The proceeding before the Referee in Bankruptcy was not an adjudication or determination of the rights of the parties to this property. The proceeding to reclaim property is plenary and formal in its nature—it requires the filing of a verified petition, the joining of issue by answer of Trustee, the setting down for hearing and trial,

and the entry of an order determining the rights of the parties, neither of which was done. The Referee cannot determine such rights by summary proceedings—without the voluntary submission of the controversy to him for settlement and without the consent of the claimant.

Loveland on Bankruptcy, 4th Ed. P. 852.

### ARGUMENT

This is a bill in equity to determine the respective rights of the parties in and to certain personally sold and delivered by Meier & Frank Company, to the Italian Restaurant Company, a corporation, as between said Meier & Frank Company and the Trustee in Bankruptcy of the Estate of said Italian Restaurant Company, a bankrupt. This sale was made and consummated in the City of Portland, State of Oregon. Title in and to said property is claimed by Meier & Frank Company, by virtue of a certain contract of conditional sale entered into by and between it and the Italian Restaurant Company on November 26th, 1912, under which contract said goods in controversy were sold and delivered to said Italian Restaurant Company, now bankrupt. On May 19th, 1913, a petition in involuntary bankruptcy was filed against the Italian Restaurant Company, which was thereafter duly adjudicated a bankrupt, and R. L. Sabin elected as Trustee of said estate. Among the property of the bankrupt coming into the hands of said Trustee, was the personalty in

controversy, title to which it is claimed was vested in said bankrupt, on the ground that the sale thereof from the Meier & Frank Company was an absolute sale, or at least that any reservation in title therein was void as against said Trustee.

It may be stated then, that the crux of this controversy, is whether or not the goods enumerated and designated herein are covered by a conditional sale, and if so, its effect and validity against a Trustee in Bankruptcy.

### I.

The Meier & Frank Company, a corporation, owns and conducts a large department store in the City of Portland, Oregon, and as such, deals extensively in the sale of furniture and housekeeping goods, and in generally outfitting homes, restaurants, etc.

On or about November 26th, 1912, the Italian Restaurant Company, represented by Mr. Everett and Mr. Pearson, its officers, called upon the Credit Man of Meier & Frank Company, a Mr. Kiernan, for the purpose of making arrangements regarding credit, the said company desiring and intending to completely outfit a restaurant which it was about to open in the City of Portland. All of the negotiations which led up to the making of this contract in controversy were entered into and made by Mr. Kiernan, representing the Meier & Frank Company, and Messrs. Everett, Pearson and Montrezza, representing the Italian Restaurant

Company. It was understood and agreed by and between the parties that the complete outfitting of this restaurant was to be done by the Meier & Frank Company, but that the title to all of said property was to remain in said company until full payment thereof had been made.

At the time such negotiations were pending, it was of course impossible to ascertain with any exactness or certainty the full value of the goods to be thus furnished, but at said time, it was estimated and approximated that the cost would be about the sum of \$1500. We desire to point out, that so far as the terms of the contract were concerned, at the time it was entered into, they may be briefly summarized as follows: The vendor contracted to completely furnish and outfit vendee's restaurant; title thereto was to at all times remain in the vendor until fully paid; payments were to be made in installments of \$100 per month; the goods were to be delivered as required and until the restaurant had been completely furnished and outfitted; that as deliveries were made, the items were to be invoiced and attached to the agreement; that the true consideration was to be the total purchase of all of such goods, as fixed and determined by the total of all of such items as invoiced. Such in brief was the agreement, as testified to by Mr. Kiernan, and which stands alone, unimpeached and uncontradicted. It is true that at the time they entered into this agreement, they estimated the total cost of the furnishing and

outfitting to be in the sum of \$1500, but as the work of preparation went on, as goods were being delivered, the vendee ordered additional or more valuable goods until the total of something like \$3000 was reached, but at all times, it was the express stipulation and agreement of the vendee, that all of such goods were received under the terms of the contract of conditional sale. And we therefore submit to this Court that if such be the agreement of the parties, and it stands undisputed, it should, in all fairness and justice, prevail.

It was only upon this clear understanding as to reservation of title, that a written memorandum of contract of conditional sale (Trustees Exhibit A) was entered into, by and between these parties, which reads, in part, as follows:

“In consideration of the payment to it of the sum of \$1500, by purchaser as hereinafter provided, the seller hereby promises and agrees to sell and transfer unto the purchaser all of the personal property, described in the list hereto attached and marked ‘Exhibit A,’ which is hereby made a part hereof.

\* \* \* \*

“It is expressly understood and agreed that the title to said property shall remain in the seller until each and all of the payments hereinbefore mentioned shall have been made by such purchaser, and that if at any time said seller shall take possession of said property, as

hereinbefore provided, then in such event any amount or amounts of money paid by said purchaser, under this agreement, on said property, shall be considered as payment for the use of said property by the purchaser, and the purchaser shall have no claim against the seller on account thereof, and in case any action or proceeding at law is instituted by the seller herein to secure the possession of said property, or any part thereof, or to collect any amount becoming due thereunder, then and in such event the purchaser herein promises and agrees to pay such sum as the Court may adjudge reasonable as attorney's fees in such action or proceeding."

At the time this contract of conditional sale was entered into and executed, no Exhibit "A" was attached, it being expressly understood, as stated, that such Exhibit "A" was to consist of the invoices of such goods to be thereafter delivered to the Restaurant Company, as required, all of which deliveries, in the future, were to be made by virtue of and under this written contract of conditional sale, and it was expressly agreed and understood that title thereto was to at all times remain in the vendor.

The Court below, in its opinion, held that this written contract was indefinite and uncertain, by reason of the fact that it did not have attached thereto Exhibit "A" which would identify the

goods to be covered by this contract. Assuming, then, for the moment, that the Court's interpretation of this instrument is correct, surely there can be no question but that parol testimony is admissible and proper to ascertain the true intention of the parties where the contract is ambiguous or uncertain. And the intent of the parties is always the controlling element in transactions of this kind.

A conditional sale is where it is agreed that until the price is paid, the title is to remain in the vendor. To constitute a conditional delivery, it is not necessary that the vendor should declare the condition in express terms at the time of delivery. It is sufficient if it can be inferred from the acts of the parties and the circumstances of the case that it was intended to be conditional. No particular words or terms of expression are necessary for the creation of a conditional sale. Any words which indicate an intention to annex a condition to the sale will be sufficient. (*McManus v. Walters*, 61 Pac. 686.)

And what does the testimony in this case show to be the intent of the parties as to the terms and conditions of this sale; and more particularly, as to the title to the goods in controversy? It is admitted that the only parties who might know of the negotiations leading up to the making of this contract, the terms and conditions under which these goods were delivered, and the parties who

executed the written instrument, expressing the intention of the parties, are Mr. Kiernan, on behalf of the vendor, and Messrs. Everett, Pearson and Montrezza, on behalf of the vendee. At the trial of this case, in support of the Trustee's contention that these goods are not covered by a conditional sale, the testimony is absolutely barren of any proof whatsoever bearing upon this most important point, but it may be stated, that the Trustee relied for his relief solely and entirely upon an alleged adjudication of the merits in controversy before the Referee in Bankruptcy, which as before stated, the learned Court below, decided the testimony did not substantiate. Not one of these three gentlemen, Messrs. Everett, Pearson or Montrezza, appeared before the Court to say that these goods were not covered by a conditional sale, and this, notwithstanding the importance of such testimony, if such was the true fact, as claimed by the Trustee. Their absence at this trial, when their presence could have been secured, is absolutely convincing, in our opinion, of the nature of the transaction, under which these goods were secured.

On behalf of the vendor, Mr. Kiernan was called as a witness, and his testimony is clear and evident that the title to these goods was at all times vested in the vendor, only to be divested upon payment of the full purchase price, and that this was not done; that the transaction was a conditional sale, and included these goods deliver-

ed subsequent to the making of this contract.

It might be well at this time to point out certain extracts of Mr. Kiernan's testimony adduced at this trial, bearing upon the question of intention of the parties, which it must be conceded, is always controlling in transactions of this kind:

Q. Who else did you deal with representing the restaurant company except Mr. Pearson?

A. I talked to Mr. Everett—C. V. Everett, and I talked to Mr. Pearson, was the only ones I talked to—Mr. Everett, Everett and Pearson were the prime movers in it. And Montrezza signed this for me, the secretary. I went to their office and had it signed up.

Q. There has been something said about what Schedule "A" was, referred to in this contract.

A. They are the itemized bills of the purchases. They are taken directly from the sales-checks.

Q. At the time that contract was signed, I mean, at the identical date the signatures were affixed, was there any Schedule "A" there at all?

A. There was not.

Q. Was there anything affixed to it marked "A"?

A. There was not. There never was on the three thousand contracts we have, it has

never been done. It is impossible to do it.

Q. But the agreement was that all of the goods purchased, as furniture and crockery, by the Italian Restaurant Company, was to be under a lease contract?

A. Absolutely.

Q. Otherwise, would you have given them that much credit?

A. We wouldn't have given them any credit.

Q. Did they have anything to give them credit on?

A. They didn't have anything to give them credit on. As a matter of fact, their credit having been without taking title to the property, it was so perishable, the nature of it, that I insisted upon Mr. Pearson guaranteeing the payment of it, and also Mr. Everett, personally. Aside from being officers of the company, they had to sign it personally.

(Transcript of Record, pp. 34-35.)

★ ★ ★ ★

Q. I will ask you, Mr. Kiernan, whether any of the other creditors knew that this property was held down there under a lease-contract by the Restaurant Company?

A. Every credit man in the city of Portland selling them must have known that, because different mercantile agencies knew it. That is, several creditors called us up—for in-

stance, several of the stores around town called us up, and asked us about our dealings with them. Of course, they knew we were putting the goods in there. They wanted to know how we were selling them. We told them all under contract.

(Transcript of Record, pp. 36-37.)

★ ★ ★ ★

Q. Now, you say that all these goods were gotten at the same time?

A. Delivered at the same time, yes.

Q. Delivered at the same time?

A. Yes.

Q. And they were delivered about the 28th day of December?

A. Yes, sir. They were trying—they were making herculean efforts to get that through by the first of the year. They wanted to open the first of the year.

Q. All of it was on the contract?

A. Every bit of it, absolutely.

Q. And was understood at the time?

A. Absolutely.

Q. And all the goods were chosen by the 28th of course, had to be, if it was delivered by then?

A. Yes, sir.

Q. Will you explain why goods amounting to \$1369.72 were dated January?

A. Yes, because we close our books, don't

you see—we closed our books in December—I should imagine we closed our books on December 26th.

Q. So from December 27th on, you would date it——

A. January, yes.

Q. January?

A. Yes. The same as you get your bills. We advertise, don't you see, all purchases for the last five days of the month go on the next month's bill.

Q. Well, now, will you explain the goods purchased on January 28th—I mean, December 28th, January 3-6-10 and 25? How is that on the same bill?

A. What is that, now?

Q. Why are the goods shipped on the 28th, or purchased on the 28th of December, January 3-6-11 and 25 on that bill, if they were sent on the 28th?

A. Because I have explained to you we close our books on the 26th, and all purchases made from the 26th appear on your January bill.

Q. Is that the reason why goods purchased on January 3rd and 6th, for instance, were sent on December 28th?

A. No, they were actually purchased on these dates.

Q. They were purchased on those dates?

A. Yes, sir.

Q. How did you get that in the conditional contract, if all the goods under the conditional contract were sent on the 28th?

A. Because it was our understanding that every thing they might buy in the furnishing up of this place was to go on conditional contract.

(Transcript of Record, pp. 50-52.)

★ ★ ★ ★

Q. This contract of lease is dated the 26th day of November?

A. Yes, sir.

Q. And about all these goods, nearly all of them, were delivered about the 28th day of December?

A. All within two days.

COURT: That is more than one month after this contract was signed.

A. Yes, your Honor, because they were engaged in cleaning up.

(Transcript of Record, p. 61.)

★ ★ ★ ★

Q. Mr. Kiernan, there has been brought out here, this contract was signed on the 26th day of November, and this contract says you have sold goods "described in the list hereto attached and marked Exhibit 'A.'" Was that list ever attached to this contract?

A. Yes, they are always.

Q. Which is the list?

A. It becomes a copy of our bills. Every contract, there is an original bill goes to the customer—sometimes you get your bill on the first of the month; then there is a duplicate which goes in a binder, which are kept there, which are permanent records of the store, and a triplicate goes on here.

Q. Was that list attached with the concurrence and consent of the buyer?

A. Of the people signing it, yes, because a great many people say, for instance, sometimes we leave this blank, and they say “Well now, how about this figure?” “Well,” we say, “We only ask you to pay for what is afterwards attached,” you see, to their bill.

Q. That leaves it with the seller to fix his own Exhibit A, and attach it thereto, and thereby it is made part of the contract?

A. He understands, your Honor, that is just going to be a duplicate of his purchases.

(Transcript of Record, pp. 61-62.)

Aside from the written instrument itself, this testimony given by Mr. Kiernan at the trial of this case, is all that was presented from which to determine the intention of the parties as to the nature of the transaction—the circumstances under which it was entered into and the conditions under which the goods now in controversy were delivered. Mr. Kiernan’s statement, standing as

it does, unimpeached and uncontradicted, must be deemed as admitted, and true. We therefore contend that it is decisive of the merits in this case.

In this connection, we desire to call the attention of the Court to the case of **Benner vs. Puffer**, 114 Mass. 376, a case somewhat similar to the one in issue. Here the plaintiffs, who were dealers in furniture and housekeeping goods, made a parol contract with one Mead, by the terms of which they were to furnish said Mead with furniture and housekeeping goods, half of the purchase money to be paid down and the rest from time to time as Mead was able to pay it. The articles furnished were to remain the property of the plaintiffs until the last cent of the money due on them was paid. The plaintiffs furnished goods under this contract from time to time, amounting to \$1149, payments being made during said period to the amount of \$850. The plaintiffs claimed the goods by virtue of a breach. Upon the trial, the defendants contended that the contract was illegal, because it covered the sale of articles not present or delivered, and which the plaintiffs did not own or possess at the time. The court held that the rule that the sale of goods not in existence or which did not actually or potentially belong to the vendor at the time is void has no application to this case as presented by the facts. That it is immaterial whether the plaintiffs had them at the time of the contract or not, the goods having been deliver-

ed and accepted by Mead under the contract. The conditions of the contract attached to them upon delivery and Mead held them on condition that the property should remain in the plaintiffs until the purchase money due under the contract was paid. The conditions having not been fulfilled, no title to the goods passed to Mead and he could not give a valid mortgage to the defendants.

It was clearly the intention of the parties in this case to pledge **all** of the enumerated property as ascertained from the duplicate invoices, and made a part of Exhibit "A," attached to this contract. It appears from the authorities that a conditional sale does not have to be in any particular form, and that it may include any property that a purchaser may afterwards acquire if such be the express stipulation and agreement of the parties. That it is only in cases where a conditional sale is required to be in writing in order to be valid, that, so far as after-acquired property is concerned, it must indicate such property clearly enough to enable one to determine what property is meant, and even then this result is accomplished if the language used puts one on inquiry in such a way as to necessarily lead to knowledge of the property intended to be conditionally sold. As to such after-acquired property, the rule is that the contract will be held to extend to such property. After-acquired property clauses have been held sufficient where they cover "all property purchased

in replenishment of stock," "all property purchased in addition to the present stock," and other like descriptions. In each of these cases it will, of course, be observed that testimony, *de hors* the instrument was required to identify the property. The principles involved, and applications thereto, will be found in the following cases: (*Collerd v. Tulley*, 77 At. Rep. 1080); (*Stoll v. Sibson*, 56 At. Rep. 710). The reasoning of the courts in these cases proceeds upon the idea that the contract is a continuous agreement, operating as a power and perfecting the interest of the creditor, as soon as the entire act is done in the nature of an execution of a power. (*Cumberland Nat. Bank v. Baker*, 40 At. Rep. 853.)

The circumstances in this case bear out our contention that this written contract was not to cover goods sold prior to or upon the execution of written memoranda, but to cover and include goods sold and delivered in the future, and that the sum of \$1500 was not the true consideration of this contract, but was merely an estimate of such, it being expressly understood and agreed that the total value of the goods furnished by vendor in outfitting this restaurant, was to stand as such consideration, and that the reservation of title in vendor included all of such goods. From an examination of the Trustee's Exhibit "A," the list of items attached to said instrument shows that notwithstanding that the agreement was entered

into November 26, 1912, the first substantial delivery was not made until December 28, 1912, thus clearly proving that the intention of the parties was, that such contract was a conditional sale reserving the title in the vendor in after acquired property as well.

In view of all the circumstances in this case, in view of the express stipulation and agreement of the parties, surely their intention is not to be lightly disregarded, but in all fairness and justice, a court of equity should support and sustain it.

## II.

Assuming, then, that it was the intention of the parties, as evidenced by the testimony adduced at this trial, that these particular goods in controversy were sold by the vendor to the vendee, under a contract of conditional sale, and assuming further, that the written proof of such contract was insufficient, and that it was entirely an oral agreement, the question to be next determined is whether such an oral conditional sale is valid against the Trustee in Bankruptcy.

It is well known that in the absence of statute, a writing is not necessary to constitute a valid conditional sale (35 Cyc. 663). There surely is nothing in the nature of this contract which would forbid the parties from entering into it if it is valid by the laws of the State where made, and in bankruptcy the construction and validity of such

a contract must be determined by the local laws of the state where made. (Thompson v. Fairbanks, 196 U. S. 516); (Humphrey v. Tatman, 198 U. S. 91.)

It may be stated, without question, that there are no statutes in the State of Oregon which require such a contract of conditional sale to be in writing. It is true that in a number of states, such contracts must be in writing and recorded, in order to be valid as against lien creditors, mortgagees and purchasers for value. And even in states where registration of a conditional sale is necessary, a writing is not necessary as between the parties. (35 Cyc. 663.) So therefore, had this controversy arisen only as between the vendor and vendee, there would be no difficulty in arriving at its determination. Here, however, the Trustee in Bankruptcy of the Estate of such vendee has intervened, and the situation is somewhat different, so far as their relative positions are concerned.

Prior to 1910, the Trustee in Bankruptcy took no better right or title to the bankruptcy property than belonged to his general creditors at the time the trustee's title accrued. Under the Bankruptcy Act of 1898, the trustee is affected with every equity which would affect the bankrupt himself if he was asserting those rights and interests. The Supreme Court, in many decisions on this subject, held, that as between the trustee and the vendor of property sold on conditional sale, such trustee

stands in the place of the bankrupt and that he can take in no better manner than the bankrupt could; that such trustee is not, and can not claim as a subsequent purchaser in good faith as against the vendor; that he is in no sense a lien creditor, and bankruptcy proceedings do not operate as a judicial seizure conferring new and greater rights on the creditors of the bankrupt; that even in a state where conditional sales are valid between the parties, although not filed, the trustee stands in the shoes of the bankrupt. (Hewit vs. Berlin Machine Works, 194 U. S. 296) (York Mfg. Co. vs. Cassell, 201 U. S. 352.)

However, Sec. 8 of the Act of June 25th, 1910, amending Section 47-a of the Act of 1898, provides that "such trustee as to all property in the custody of the bankrupt or coming into the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon and also as to all property not in the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution, duly returned unsatisfied." So, therefore, since this amendment, the position of the trustee has been greatly strengthened. The trustee now stands in the shoes of the bankrupt, clothed with the rights, remedies and powers of a lien creditor and a judgment creditor, instead of a general creditor as before

the amendment. The amendment, in brief, fastened a lien on the property of the bankrupt estate, in favor of the trustee. (Loveland on Bankruptcy, 4th Ed. P. 767.)

Yet, after all, conceding all this, wherein does a lien creditor have any greater rights than the vendee himself, under a contract of conditional sale, made and entered into in the State of Oregon, where such contracts, with but one exception, are not required to be in writing or recorded?

Section 7414 L. O. L. requires only such contracts of conditional sale to be in writing and recorded, where they cover fixtures so attached to real estate, as to become a fixture thereto.

The goods in controversy do not come within this classification, and no contention is made that they do. Outside of this one exception, the recording acts of this State do not require contracts of conditional sale to be in writing or recorded. Acts of recording are intended solely for the benefit of third parties. The real purpose of requiring instruments of this kind to be in writing and recorded is to protect those who from the fact of possession and apparent ownership by the vendee may be led to believe him to be the actual owner of the property held by him under an agreement of conditional sale. But such protection is purely statutory, and while it may be considered inequitable, unjust and unfair to third parties who might suffer by the absence of such a protecting statute,

yet if the people of this State have not seen fit to incorporate it in our laws, we surely cannot make up for their omission by endeavoring to impress it upon our statute books to meet the exigencies of this case. If this is a conditional sale, if title is still vested in the vendor, it is valid, under the laws of this State, whether oral or in writing, and valid against the vendee's subsequent purchasers for value, mortgagees or lien creditors for the vendee, never having title, could not give one, or encumber what he has not. (*Harkness vs. Russell*, 118 U. S. 663) (*Benner vs. Puffer*, 114 Mass. 376.)

In *Blackwell vs. Walker*, 5 Fed. 419, wherein was involved a verbal conditional sale, the Court held that "such sales, oral or in writing, being valid under the laws of the state wherein made (*Arkansas*), the creditors of and purchasers from the conditional vendee acquire no right to the property as against the vendor who has been guilty of no fraud and no laches in asserting his rights. Conditional sales were valid by the common law and their validity was not affected by the provisions of the Statute of Frauds nor are they within the recording acts of said state."

### III.

While this suit in the Federal Court was primarily one to determine in whom is vested the title in and to these goods as between the Trustee and the vendor, yet the Trustee upon the trial of this

cause offered no proof or testimony whatsoever showing his right to these goods, but strictly and religiously confined himself to the proposition that there had already been a determination of the merits in controversy before the Referee, who had duly and regularly passed upon the vendor's claim, in favor of the Trustee. The learned Court below decided that the proof offered was insufficient to warrant his holding that there had been a prior adjudication of this matter.

We feel that it is needless and unnecessary to make a lengthy argument so far as this phase of the controversy is concerned, for the testimony is clear that the usual and regular method of presenting claims and reclamation petitions in Courts of Bankruptcy was not followed in this instance, but to the contrary, the evidence is conclusive of the intention of the vendor not to file any such claim or petition, and that therefore there could not have been any such adjudication of the merits, as to render it *res adjudicata*.

It is conceded that no written petition for reclamation was filed, although the bankruptcy procedure requires such petition to be duly verified and properly filed. There was no issue raised by answer of the Trustee, as is required, nor was any regular hearing had thereon, nor was any order or judgment entered by the referee upon the merits. There were none of these essential steps in procedure followed by the claimant, and

yet the Trustee claims there had been a formal adjudication! There could not be anything before the Referee until a claimant confers jurisdiction upon him by voluntarily submitting himself before him, by filing a verified reclamation petition. And this was not done. The fact that the vendor made known his claim, upon repeated requests so to do, does not mean that he intended to prosecute or insist upon the compliance of his contention, and he could only do so in the usual and regular manner by filing a verified petition.

A claimant to personalty in the possession of a trustee may either bring an original suit against the trustee or receiver in a court of bankruptcy for the recovery of the specific property claimed to be owned by him, or may file an intervening petition in the bankruptcy proceedings. An intervention of this character is sometimes called a reclamation proceeding—it is really an equitable intervention. This practice is very similar to that upon an intervening petition filed in a suit of equity. The proceeding to reclaim property is very plenary and formal in its nature. The petition must be verified. (Loveland on Bankruptcy, 4th Ed. P. 852.)

In view of the strictness of these proceedings and in the face of all the testimony, which shows the stand and position taken by the vendor very clearly and distinctly, it seems there can be no question that so far as the rights of the parties

were concerned, there could have been no determination or adjudication of the merits in controversy.

### IN CONCLUSION

If there is any solemnity, gravity or impressiveness in the making of a contract between two parties, be it oral or in writing, so long as it is valid according to the laws of the State where made, this contract of conditional sale should be upheld and sustained. Here the vendee, desiring to embark upon the perilous sea of business ventures and uncertainty, as a restaurateur, a profession dependent upon the whim and caprice of ever-changing palates, and relying upon the pleasure of exacting gourmands and epicures, made overtures to the vendor for the furnishing and outfitting of his epicurean palace. Ready money there was none, but visions of enormous business and of great profits were plentiful. Credit they sought, and the vendor was ready to give credit, provided he was secured, a request which was but reasonable and proper, and readily consented to by the vendee, who had nothing material or substantial, but the aforementioned visions. It was on November 26th, 1912, that these negotiations crystallized and assumed definite shape, for it was on that day that the contract of conditional sale was entered into, and whether it be written or oral, the intentions of the parties, as expressed by Mr.

Kiernan, and which were not challenged or disproved, should in all fairness and justice, prevail. On that date it was not known exactly and precisely just how much equipment was required to properly furnish this proposed palatial establishment, so it was expressly understood and agreed that the invoices of the goods to be thereafter furnished to this vendee, were to be successively attached to and made a part of this Exhibit "A" mentioned in this contract of conditional sale; all of such goods to be included under the terms of said contract. But it was estimated at said time that the total cost thereof would be about \$1500 and it was accordingly written in said instrument. The vendees in this case, however, well knew that this consideration of \$1500 was merely nominal—that it did not and could not, represent the actual value of such furnishings down to the very dollar—they knew what the express agreement and stipulation was in this regard—they knew it mattered not if they bought \$5000 worth of goods, so long as they were ordered by them in the furnishing and outfitting of said restaurant—that such goods would all come under the terms of this contract of conditional sale! And if such be the understanding and intention of the parties, and if such a stipulation can be lawfully entered into, and if it need not be in writing and recorded under the laws of this State, can a third party be heard to complain that in spite of this express agreement of the parties,

he has suffered damage, in some way or other, and is therefore entitled to break this solemn covenant to meet his demands for recompense? Is it fair, is it just to the vendor, who relies upon the laws of this State for the validity of these contracts of conditional sale? Is he to suffer because there are no other assets of the bankrupt to appease the rapaciousness of his angry creditors? Had this vendee seen fit to sell all of these goods, held by him under this verbal conditional sale, to a purchaser for value, and without notice, would there have been any doubt as to the transaction, where the law of this State does not require such instruments to be recorded? Not having title, he could not give one, and the conditional vendor could follow the goods even in the hands of such innocent purchaser. What greater right, then, has this Trustee, who, with all the powers lately conferred upon him, is at best a lien creditor? Are greater privileges granted unto a lien creditor than an innocent purchaser does not possess? Then, if we are to concede that it was the intention of the parties that these particular goods were covered by the contract of conditional sale; if we are convinced that there is no statute in the State of Oregon requiring conditional sales of such goods to be in writing and recorded; then we must conclude that title was at all times vested in the Meier & Frank Company, and the conditions of such contract having been broken, they are enti-

tled to the possession of such goods as against the Trustee of the Estate of the vendee.

We therefore pray that the decree of the Court below be reversed.

Respectfully submitted,  
JOSEPH & HANEY,  
BARNETT H. GOLDSTEIN,  
Attorneys for Appellant.



# In the United States Circuit Court of Appeals

For the Ninth Circuit

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MEIER & FRANK COMPANY, a  
corporation,

Appellant,

vs.

R. L. SABIN, as Trustee in Bankruptcy  
of Italian Restaurant Company, a  
corporation,

Appellee.

## BRIEF OF APPELLEE

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### STATEMENT OF THE CASE.

The facts in this case stated in the sequence of time in which they arose, so far as the Trustee in Bankruptcy, the appellee herein, is concerned, are as follows:

The Italian Restaurant Company was adjudicated a bankrupt, and appellee herein elected Trustee. In the endeavor to dispose of the assets the Trustee encountered an adverse claim to certain property in his

possession, namely: the furniture and fixtures which are here in controversy. After ascertaining that the property lawfully belonged to the bankrupt, and that the appellant, Meier & Frank Company, had no valid claim thereon, the property was offered for sale, but before a sale was made an opportunity was given the appellant to assert its claim. The appellant appeared before the Referee in Bankruptcy, and petitioned to reclaim the property; the Referee in Bankruptcy conducted a formal hearing, the testimony was transcribed, the contract under which appellant claims was introduced by it and a decision was made by the Referee adversely to the appellant. It is but fair to state, however, that appellant denies that the hearing before the Referee was intended to be formal or binding upon it in any manner and as evidence of this fact appellant urges that no petition for reclamation was ever filed by it. Appellee, however, to this contention answers that it was stipulated and agreed at the hearing that the petition for reclamation should be considered as filed. (See testimony of Chester G. Murphy, Referee, Transcript of Record pp. 17 and 18; and of A. E. Gebhardt, pp. 68 and 69.) Upon the decision of the Referee the Trustee offered the property for sale to the highest bidder and sold the same to one J. T. Wilson. Before the payment of the price to the Trustee by J. T. Wilson, and delivery of the property to him, Meier & Frank Company entered suit in the state court and further threatened to institute suit against any person in whose possession the property might come, for the recovery of said property. Where-

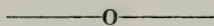
upon the Trustee filed his bill in equity in the District Court of the United States for the District of Oregon to enjoin the said Meier & Frank Company from further interfering with the property and to remove any cloud of title therefrom, asserting that the question as to the interest of Meier & Frank Company in said property had been already adjudicated before the Referee in Bankruptcy; and that further, Meier & Frank Company had no interest in said property, having no valid lien thereon. Meier & Frank Company thereupon answered said bill denying prior adjudication of its rights, and also asserting its interest in the property in question. At the trial of the cause, excluding the question of *res adjudicata*, it was maintained by the Trustee that Meier & Frank Company had no interest in the property in question for the reason,

1. That the contract was void because of indefiniteness and uncertainty; and
2. That the written contract between the parties was the measure of their rights, and the contract had been fully performed by payment of the moneys due thereunder;
3. That parol evidence could not be introduced to aid the contract, vary it, or to add thereto.

These contentions were controverted by Meier & Frank Company. The testimony and evidence offered discloses no real conflict of fact. The contract which was introduced purported to be one of conditional sale

in which title was reserved in the seller until payment, and set forth that in consideration of \$1500.00 to be paid by the purchaser (Italian Restaurant Company), the seller (Meier & Frank Company) agreed to sell to said purchaser "all of the personal property described in the list hereto attached and marked 'Exhibit A' which is hereby made a part hereof," it being testified and admitted that *no list or exhibit was attached to said contract* at the time the same was executed (Transcript of Record pp. 35, 60, 61); nor was there any intention so to do (Transcript of Record p. 62); and, in fact, the parties themselves did not know what was to be purchased at that time (Transcript of Record p. 52). It was further testified on behalf of the appellant that it was not the intention of the parties to attach any particular list to this contract, but that there was to be attached thereto a list of only such goods as might be bought in furnishing and fitting up the place from time to time, and that it was the understanding and the idea of the parties that the lien of this so-called conditional contract of sale would continue indefinitely; and that the parties might have continued their trading under the contract until all except \$150 for example, had been paid, and then more goods purchased, and these goods paid for and still more goods purchased and these goods and the former goods all but paid for, and so on, "running month by month and year by year," and the lien of the contract would be effective *as to all the goods purchased since its original execution*, the title to *all* of which goods appellant claimed. (Transcript of Record pp.

63, 65, 66.) During the time of the continuance of this contract Meier & Frank Company had also an open account with the parties but the balance due on the open account at the time of bankruptcy was infinitesimal. Upon this contract, it was testified at the time of bankruptcy, there had been paid practically the exact sum of \$1500.00 and interest, the consideration set forth in the conditional bill of sale (Transcript of Record pp. 48, 49, 50). Under these facts, all of which were testified to by the credit manager of Meier & Frank Company, appellant, the party who conducted negotiations with the officers of the Italian Restaurant Company, the appellant, insisted that the lien of its alleged conditional bill of sale should extend to the property in question, notwithstanding the consideration set forth therein had been fully paid.



## FINDING OF FACTS BY THE COURT.

The findings of fact informally stated by the Court in its oral opinion (Transcript of Record pp. 77 and 78) may be summarized and stated as follows:

### I.

THAT THE PARTIES ENTERED INTO A WRITTEN CONTRACT WHEREBY MEIER & FRANK COMPANY AGREED TO SELL

CERTAIN GOODS CONDITIONALLY, THE CONSIDERATION FOR SAID SALE BEING \$1500.00 AND BEING COUCHED IN THE CONTRACT FOR THE PURPOSE OF INDICATING THE REAL VALUE OF THE PURCHASE AND THE REAL CONSIDERATION AGREED UPON.

## II.

THAT THE CONTRACT PURPORTED TO HAVE ATTACHED TO IT A LIST OF PROPERTY MARKED "EXHIBIT A;" THAT THE LIST WAS NOT ATTACHED TO SAID CONTRACT AT THE TIME IT WAS EXECUTED, NOR WAS IT "REALLY THE INTENTION OF THE PARTIES TO ATTACH ANY PARTICULAR LIST TO THE CONTRACT" AND THAT NO LIST HAD EVER BEEN SO ATTACHED.

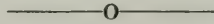
## III.

THAT THE CONTRACT, THEREFORE, WAS INDEFINITE AND UNCERTAIN.

## IV.

THAT THE WRITTEN CONTRACT WAS EXECUTED ON NOVEMBER 26, 1913; THAT THE GOODS PURPORTING TO BE SOLD

AND TITLE RETAINED UNDER SAID CONTRACT, AS IS SHOWN BY THE ACCOUNT INTRODUCED, WERE SOLD DURING THE MONTHS OF DECEMBER, JANUARY AND FEBRUARY AGGREGATING \$3200.00, AND THAT THE CONSIDERATION NAMED IN SAID CONTRACT, TO-WIT, \$1500.00, HAD BEEN FULLY PAID.



## DECISION OF THE COURT.

The Court duly propounded in said case the following propositions of law in regard to the said contract: (Transcript of Record, pp. 77 and 78.)

### I.

THAT THE CONTRACT ITSELF WAS VOID FOR WANT OF CERTAINTY AND DEFINITENESS, BECAUSE OF THE FACT THAT IT PURPORTED TO TRANSFER CERTAIN PROPERTY "DESCRIBED IN THE LIST HERETO ATTACHED AND MARKED EXHIBIT A, WHICH IS HEREBY MADE A PART HEREOF," AND NO LIST WAS ATTACHED TO SAID CONTRACT OR MADE A PART THEREOF, NOR INTENDED THUS TO BE AT THE TIME IT WAS EXECUTED.

## II.

THE WRITTEN CONTRACT, THEREFORE, BEING VOID, A VERBAL CONTRACT COULD NOT BE SET UP IN ITS PLACE, NOR COULD THE WRITTEN CONTRACT BE MADE VALID BY ADDING THERETO BY PAROL TESTIMONY, BECAUSE OF THE FACT THAT THE PARTIES HAD ATTEMPTED TO SHOW A WRITTEN CONTRACT, AND HAVING SO ATTEMPTED AND FAILED, THEY COULD NOT THEN SUBSTITUTE IN ITS PLACE A VERBAL ONE.

## III.

THAT EVEN THOUGH THE WRITTEN CONTRACT BE A VALID ONE, YET THE PURCHASE PRICE AS FIXED BY THE CONTRACT HAD BEEN PAID, THE CONDITION PERFORMED, AND THE LIEN THEREBY TERMINATED.

## IV.

THAT SUFFICIENT IS NOT SHOWN BY TESTIMONY OR RECORD TO DETERMINE THAT THE MATTER HAD BEEN *RES ADJUDICATA* (ALTHOUGH THE REASON FOR THIS STATEMENT IS BELIEVED TO HAVE BEEN THAT THE DECISION UPON THIS POINT WAS NOT NECESSARY TO THE DETERMINATION OF THE ISSUE).

## CONTENTION OF APPELLANT.

It is difficult to extract from appellant's brief a clear and logical statement of its contentions since appellant does not formulate them therein but necessarily it must controvert the findings and decision of the trial judge, and its contentions concisely stated, appear to be that as to the trustee the contract was not invalidated by its uncertainty, but if it be, yet it may be aided by parol evidence or that the written contract may be wholly ignored and replaced by an alleged complete oral agreement; that the price reserved in the contract has not been fully paid and the alleged lien is still effective.

## APPELLEE'S CONTENTION.

The decision of the District Court may be conveniently resolved into the following topics, and the discussion had under that classification:

### I.

**THE INDEFINITENESS AND UNCERTAINTY IN THE PROPERTY DESCRIBED IN THE CONDITIONAL BILL OF SALE INVALIDATES THE SAME.**

Weeks v. Maillardet, 14 East, 568, 106 Eng. Rep. (Reprint) 729.

Barkman v. Simmons, 23 Ark. 1, 5.

Moir v. Brown, 14 Barb. (N. Y.) 39.

Dodd v. Martin, 15 Fed. 338, 341.

Belknap v. Wendell, 21 N. H. 175, 183.

Payne v. Wilson, 74 N. Y. 352.

Cass v. Gunnison, 57 Mich. 108, 115.

Gregory v. N. P. Lumbering Co., 15 Ore. 447,  
452.

Lee v. Cole, 17 Ore. 559, 561.

Flanagan Bank v. Graham, 42 Ore. 403, 418.

Ayre v. Hixson, <sup>53 19,</sup> ~~10~~ Ore. 31.

In the case of *Weeks v. Maillardet*, 14 East, 568, 104 Eng. Reports (Reprint) 729, an instrument was given conveying certain mechanical pieces "as per schedule," and no schedule was at the time of the execution of the deed attached but was subsequently attached by a person acting for both parties. It was contended (as we contend here) that the omission of the schedule made the instrument inoperative because of its uncertainty and indefiniteness. Lord Ellenborough, C. J., discussing the question says:

"The whole deed is inoperative, unless the schedule was co-existing with it, and forming a part of the obligation. Taken by itself, the deed is insensible, and has no

object to operate upon; therefore, it is not the defendant's deed, without the schedule, which gives effect and meaning to the whole of the duties to be performed on either side. The articles assume that at the time of their execution the schedule was annexed, and if there were then no schedule, there was no deed for any sensible purpose, for no duty could be demanded on the one side, or performed on the other side without the schedule."

This case has been much quoted by subsequent cases upon the subject. The similarity to the question before the Court is too pointed to be detailed.

In the case of *Barkman v. Simmons*, 23 Ark. 1, 5, (another case particularly similar to the one at bar) certain attached property was claimed by a third person as his property under an assignment. The instrument described the property conveyed in general terms, and then as "more particularly and fully enumerated and described in the schedule hereto annexed and marked schedule 'A.' " No schedule was attached to the deed, and upon that ground the court on motion of the defendant excluded it from the consideration of the jury as evidence in the cause. The appellate court affirmed the decision of the lower court, holding that in order to ascertain what was conveyed the deed must be scrutinized, and the deed referring to a schedule "hereto annexed," the schedule must be looked to. No schedule being annexed the deed was therefore meaningless. Says the Court:

“We cannot, for this purpose, resort to parol evidence . . . because the deed states that the schedule was annexed, specifically describing the property assigned. It was undoubtedly the intention of the parties that a schedule should be attached to, and made a part of, the deed, at the time it was executed, and without such schedule the deed was, in contemplation of law, incomplete and therefore, inoperative and void, as against creditors at least, and *perhaps* between the parties themselves.”

In *Moër v. Brozen*, 14 Barb. (N. Y.) 39, property was described generally and followed by the clause “more particularly enumerated and described in the schedule hereto annexed marked ‘schedule A’”, and there was no schedule annexed. The court held that the instrument of assignment was insensible without the schedule, and as against creditors did not convey the property to the assignees, and that parol evidence in relation to the schedule not annexed was inadmissible.

### ANALOGOUS OREGON CASES.

There are many Oregon cases likewise upon the general proposition.

In *Gregory v. N. P. Lumbering Co.*, 15 Ore. 447, 452, a chattel mortgage was offered in evidence, conveying after-acquired property, and was objected to upon

the grounds, among others, that the description of the lumber in the mortgage was void for uncertainty, the lumber being described as "the lumber piled on said premises, being more particularly described as Block 113, City of Portland." The Court, by Thayer, J., says:

"I do not think it was sufficiently certain to render the mortgage operative and effectual to bind any lumber unless it were shown by extrinsic proof that Lewis, *at the time the mortgage was executed* (italics ours), had lumber answering to such description."

In *Lee v. Cole*, 17 Ore. 559, 561, the mortgage was given upon the "Chronicle Plant," and was intended to cover certain fixtures, fittings, etc., to be afterwards acquired, for the use of operating a newspaper and printing establishment. The court, discussing whether the property was sufficiently described, says:

"In order to mortgage property so as to create a lien upon it, such property must be ascertained and identified *at the time of the execution of the instrument*," (italics ours).

and quoting Pomeroy on Equity Jurisprudence, Section 1235, the court further says:

"In order that a lien may arise, the agreement must deal with some particular property either by identifying it or by so describing it that it can be identified. It

must indicate with sufficient clearness an intent that the property so described or rendered capable of identification, is to be held, given, or transferred as security for the obligation,"

and the court holds that the plaintiff in this cause, who was the purchaser and who, it was claimed, took the property subject to the alleged mortgage lien, could not have known what property was to be subject to his lien, and therefore that the mortgage at least as to him, was void.

And so, in *Flanagan Bank v. Graham*, 42 Ore. 403, 418, construing a mortgage on after-acquired property, the court held that as to third parties without notice, the mortgage was void for uncertainty.

And in *Ayre v. Hixson*, <sup>53</sup>~~10~~ Ore. <sup>19</sup>31, the doctrine of the cases of *Lee v. Cole*, 17 Ore. 559, 561, and *Gregory v. N. P. Lumbering Co.*, 15 Ore. 447, 452, above quoted, is approved.

*The above cases promulgate the following principles of law: Where the description of the property is entirely omitted from an instrument, the instrument is void for uncertainty, and where there is a description of*

*some kind covering after-acquired property but the description is not sufficiently definite to identify the same at the time the instrument is executed, and it be later identified by the parties to the instrument, it may be valid as between said parties as AN EQUITABLE LIEN, but as to third parties, assuming that they are bona fide purchasers, said instrument is void and of no effect whatsoever.*

That the Trustee in Bankruptcy has all the advantages that such third persons would have is, of course, conceded. Reference, however, is made as to this effect to section 47-a of the Bankruptcy Act (1910 amendment) and in this connection, section 301 of Lord's Oregon Laws to the effect that an attachment creditor shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, is also adverted to.

Section 301 of Lord's Oregon Laws, or so much thereof as is pertinent, provides as follows:

“From the date of the attachment, until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached.”

## II.

THE WRITTEN INSTRUMENT BEING  
VOID BECAUSE OF UNCERTAINTY AS TO

THE TRUSTEE IN BANKRUPTCY, IT CAN  
NOT BE AIDED, OR ADDED TO, OR VARIED  
BY PAROL EVIDENCE.

Barkman v. Simmons, 23 Ark. 1, 5.

Moir v. Brown, 14 Barb. (N. Y.) 39.

Crooks v. Whitford, 47 Mich. 283, 291; 11 N.  
W. 159.

Knight v. Alexander, 42 Ore. 521, 524.

In the case of *Crooks v. Whitford*, 47 Mich. 283, 291, it was attempted to show that certain real estate which was attempted to be conveyed was the real estate in question which was purchased under a tax deed, and the court said:

“There is nothing whatever on the face of the instrument to denote what real estate the testator had in view nor anything to incline an intention one way rather than another in search of it;” and then, “It is certain that it was not competent to resort to parol evidence to supply the absent matter. The case was not one of interpretation or construction because there was nothing on which the power could be exercised and as there was no subject matter to be construed or interpreted there was no call for extrinsic facts to aid the office of interpretation or construction.”

Attention is called to the Oregon case of *Knight v. Alexander*, 42 Ore. 521, 524, which, though not directly in point (the decision being upon the question of specific performance of a contract), yet is important because the principal of law just adverted to is clearly stated. Says the court:

*“Courts do not permit parol evidence to be given to describe the property intended to be included in the contract and then apply such descriptions to the terms thereof.”*

The cases of *Barkman v. Simmons*, 23 Ark. 1, 5 and of *Moir v. Brown*, 14 Barb. 39, have already been discussed in another connection, and reference is here made to that discussion.

### III.

THAT WHERE PARTIES PUT THEIR CONTRACTS IN WRITING, THE WRITING CANNOT BE IGNORED AND PAROL EVIDENCE INTRODUCED TO SHOW ANOTHER AND DIFFERENT CONTRACT IN ITS STEAD.

Lord's Oregon Laws, Section 713.

Lee v. Summers, 2 Ore. 260.

Stoddard v. Nelson, 17 Ore. 417.

Ruckman v. Imbler Lbr. Co., 42 Ore. 231.

Ramsdell v. Ramsdell (Ore.), 132 Pac. 1167.

Pitheairn v. Hiss, 125 Fed. 110 (C. C. A. 3rd Circuit).

Lord's Oregon Laws, Section 713, provides as follows:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore, there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except (here follows certain exceptions outside of the issues in this cause)."

This enactment of the Oregon code is, of course, merely an affirmation of the general law of evidence, which law is ably expounded in the case of *Lee v. Summers*, 2 Ore. 260, where the court says:

"The theory presented in the complaint and urged by appellants' counsel is that the real contract was oral and was made on the same day, but before the writing was made, and that the terms of the agreement are not those stated in the writing.

"When parties, after coming to an agreement, deliberately reduce its terms to writing and attest it with their hands, the rule is, that no evidence of their contract

can be received except the writing itself or evidence of the contents of the writing. The rule in regard to correcting imperfections and mistakes in the writing and in regard to contesting the validity of the writing, which are briefly referred to in section 682 of the code, are not in conflict with this general and fundamental principle of the law of evidence."

And so in the case of *Pithcairn v. Hiss*, 125 Fed. 110, 113, it is well stated that

"Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it (being outside the writing by which the parties have undertaken to be bound) shall not be shown. Where, by statute, a writing is required either to create an obligation or to affect a result, as in the case of deeds and wills, or of contracts within the statute of frauds, it is readily understood that it is the writing alone that is to speak; but this is equally true of contracts which, by the convention of the parties, have assumed a similar form. The writing is the contractual act, of which that which is extrinsic, whether resting in parol or in other writings, forms no part."

It is confidently asserted, therefore, that the parties having entered into a written contract wherein it is agreed by the seller, in consideration of the payment of

\$1500.00; to sell certain property to the purchaser, the purchaser agreeing to pay said sum of \$1500.00 in installments and to insure the property in the amount of \$1500.00, title to remain in said purchaser until the payment of said sum and then upon the payment thereof to vest in the purchaser, that parol evidence even though the contract had been definite and certain as to the matter alleged to be intended to be described therein, would not be permitted to be introduced to show that property in excess of \$3,000.00 was intended to be conveyed therein in consideration of the payment of the sum of \$3,000.00.

It is believed that more need not be stated in this connection. The statement of the contention of appellant is sufficient to repute it and it is hard to give it serious consideration.

#### IV.

THAT THE WRITTEN CONTRACT HAS BEEN FULLY PERFORMED, PAID AND DISCHARGED AND THAT, THEREFORE THE LIEN OF THE INSTRUMENT, IF A LIEN EVER EXISTED, HAD TERMINATED.

As to this contention also, little need be said. The trial judge who heard the evidence found in his decision of facts that such was the case. The contract specified that goods were to be delivered to the extent of \$1500.00; that on payment of the sum of \$1500.00, title should

vest in the purchaser; \$1500.00 was paid admittedly and consequently the condition was performed and title vested absolutely in the bankrupt, and, therefore, devolved upon the Trustee.

In this connection the case of *Vanderlip v. Bishop*, 199 Fed. 420, 422 (C. C. A. 9th Circuit), may be noted. There the court lays down the rule that where there is a conflict of evidence in the court below, and the trial judge who heard the evidence and saw the witnesses made certain findings, these findings will not be disturbed unless clearly erroneous. In the case at bar there was no conflict of evidence, and the trial judge found upon his interpretation of the evidence given by the appellant that the contract had been fully performed.

See also *Thorndyke v. Alaska P. Mining Co.*, 164 Fed. 657 (C. C. A. 9th Circuit ).

## CASES CITED BY APPELLANT.

No mention has yet been made nor any discussion had of the cases mentioned by appellant in his Brief under "Points and Authorities" and elsewhere. Most of the propositions cited by appellant are merely propositions of elementary law concerning which no issue is taken; for instance: the abstract principles of law set forth in its brief under Points and Authorities numbers 1, 2, 3, 4, and 6. And while the legal propositions set forth in Points and Authorities numbers 5 and 7 are not

admitted, yet for the purpose of this Brief, respondent is willing, for the purposes of the argument, to admit the same.

The cases cited by appellant do not bear upon the issues in any respect. For example, numerous cases and authorities are cited to the effect that no particular form of instrument is necessary to create a conditional sale; that the federal court, in construing the validity of conditional sale will be governed by the local law of this state; that in the absence of statute, conditional sale need not be in writing nor recorded; that a Trustee in Bankruptcy takes the estate of the bankrupt clothed with rights and remedies and powers of a lien creditor; that the Referee in Bankruptcy cannot determine rights to property claimed adversely without the voluntary submission of the controversy to him for settlement by the adverse claimant. *But no authorities whatsoever are cited upon any of the questions involved in this case.* It is argued here and there that the contract was not indefinite and uncertain, but no cases or authorities are cited sustaining this contention. Likewise it is argued that though the contract was uncertain parol evidence is admissible to aid or supplant the written contract although not one case or authority is cited to that effect, but merely the statement is made that "surely there can be no question but that parol testimony is admissible." And then appellant proceeds to construct his house of cards built of parol and imaginative testimony.

The case of *Benner v. Puffer*, 114 Mass. 376, is referred to at length, but what bearing that case has upon the issues in question is not easily seen. There the contract entered into was a verbal contract of conditional sale, was proper and valid, not only as to goods in existence at the time it was made, but as to goods which were to be afterwards acquired. While the law in this case is not believed to be the law in Oregon, yet its purport is not easily seen in connection with the case at bar.

Likewise, appellant cites three New Jersey cases, namely

*Collerd v. Tulley*, (N. J.) 77 Atl. 1080.

*Stoll v. Sibson* (N. J.), 56 Atl. 710.

*Cumberland National Bank v. Baker* (N. J.),  
40 Atl. 853.

supposedly as authority for the alleged doctrine that property may be transferred or encumbered as against third parties, though not described in the instrument of conveyance.

In the case of *Cumberland National Bank v. Baker*, 40 Atl. 853 (N. J.), the court specifically discusses the question of description of the property and says that the description is specific and free from doubt or confusion and really recognizes the fact that if it had not been it would not be valid as to third parties. Be that as it may, however, the law in Oregon upon the question is plain as set forth in the cases of:

*Gregory v. N. P. Lumbering Co.*, 15 Ore. 447,  
452.

Lee v. Cole, 17 Ore. 559, 561.

Flanagan Bank v. Graham, 42 Ore. 403, 418, and

Ayre v. Hixson, <sup>53</sup>~~10~~<sup>19</sup> Ore. 31.

already discussed.

The other two New Jersey cases cited by appellant are to the effect that where property is described in a mortgage sufficiently to ascertain the same, and there is also attempted to be mortgaged in the instrument, property to be afterwards acquired, which is designated sufficiently to be traced, the mortgage on the after-acquired property may be valid, and while it is doubted whether the law in Oregon is to the same effect, yet these cases have no bearing upon the contention of appellant, because the property in all of these cases is held to be sufficiently *definitely described* in order to be traced, and there is no attempt made to vary the contract by parol evidence.

The case of *Bierce v. Hutchins*, 205 U. S. 340, cited in this connection, is equally as unfavorable (if it be conceded to be in point) as the New Jersey cases cited. There it is intimated that a provision in a mortgage that it shall apply to after-acquired property "with sufficient description to ascertain the same and bring it within the mortgage when acquired" may be valid.

## CERTAIN MISLEADING STATEMENTS IN APPELLANT'S BRIEF.

Counsel for appellee, before closing, feels it proper to call attention to at least two statements or insinuations contained in appellant's brief. First, that contained on page 15 in which it is stated that the failure of appellee to call Messrs. Everett and Pearson or Montrezza, officers of the bankrupt corporation to testify, was due to some sinister motive on the part of the appellee. The fact is, as may well be seen from appellant's testimony, that Montrezza knew nothing of the circumstances concerning entering into the contract, and that Messrs. Everett and Pearson were sureties for the payment of said contract (Transcript of Record, pp. 36 and 60), and necessarily both of them were adverse parties to the Trustee and stood in the same relation to the Trustee as appellant did. If any inference is to be drawn from the failure of these gentlemen to testify, the inference is derogatory to appellant and not appellee.

The other matter referred to is an excerpt from the evidence appearing on pages 17 and 18 of Appellant's Brief in which Mr. Kiernan, credit man of appellant, states in effect, that every credit man in the city of Portland selling the Italian Restaurant Company, knew that the property in this litigation was held under a lease contract from Meier & Frank Company. We append

the illuminating cross examination of this witness on this point, the omission of which from appellant's brief is significant. (Transcript, pages 58 and 59.)

"Q. You stated that some of the creditors called you up and asked you how you were selling these people?

A. Yes.

Q. What creditors called you up?

A. I remember Fleckenstein-Mayer called us up.

Q. Fleckenstein-Mayer called you up?

A. Yes, sir; I remember other creditors, but I remember Fleckenstein-Mayer because I advised him to keep out of it.

Q. Fleckenstein-Mayer is another creditor, is it not?

A. I don't remember whether it is or not. If he followed my advice he is not a creditor.

Q. What creditors called you up?

A. I remember the reporting agencies were calling up.

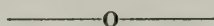
Q. But no other creditors who were selling these people goods called you up, did they?

A. I wouldn't say as to that, I don't know whether they were creditors or not, because I haven't seen the list of creditors; there was a great deal of calling up. Inasmuch as I was handling it I said, "Just tell them it is buying on contract, we don't know anything about it."

Q. What advice did you give Fleckenstein-Mayer?

A. To keep out of it."

It is very apparent from this testimony that there is no evidence of *any* creditors having knowledge that the goods which were in the possession of the Italian Restaurant Company and apparently belonged to them, and which necessarily were held out by them as a source of credit, were other than their unconditional property.



In conclusion, it is earnestly maintained that the decision of the trial judge of the district court was eminently correct, and that this controversy is merely an example of many of the controversies arising in bankruptcy whereby one creditor is endeavoring to save himself financial loss at the expense of other creditors of the same class; or, to use the words of Judge Holt, approved in the case of *Ommen v. Talcott*, 188 Fed. 401, 404, the situation is illustrative of "one of the numerous schemes by which merchants have attempted to create liens on their goods which shall be unknown to their creditors, and which shall not affect their credit, but which shall be enforceable if bankruptcy occurs. They are all based on the idea of giving notice enough to satisfy the law, and not enough to inform the creditors."

The reading of the testimony must show the situation most clearly and the discussion already has assumed greater proportions than the case warrants.

Respectfully submitted,

SIDNEY TEISER,

Attorney for Appellee.







